Public Utilities

FORTNIGHTLY

May 30, 1929

¶ BEGINNING IN THIS NUMBER: *"Mr. Spurr's Letters"—now appearing for the first time in any magazine.*

PUBLIC UTILITIES REPORTS, INC.
WASHINGTON, D. C.

The O'Fallon Decision

The Supreme Court refuses to sanction the "split inventory" valuation

At this writing the O'Fallon decision by the Supreme Court has just been handed down. The case has been referred to as the "greatest lawsuit in history" and it probably is from the standpoint of the property interests involved and its possible effect on railroad rates, and on recapture of income. But on the law side it turns upon rules which have been established by the Court for many years.

The law as interpreted by the Supreme Court is that railroads as well as other utilities are entitled to earn a return on the present fair value of their property for rate-making purposes. The Interstate Commerce Commission is required by statute in recapture cases to "give to the property investment account of the carriers only that consideration which under such law it is entitled to in established values for rate-making purposes.

What the Commission did, briefly stated, to arrive at the value for successive recapture periods, as, for example, the year 1923, was to take the 1923 market value of lands; costs of other property installed since June 30, 1919; unit prices of 1914 enhanced for increased costs of units installed during June 30, 1914–1919; and unit prices of 1914 for the units installed prior to June 30, 1914, constituting by far the major part of the property. Therefore as to the larger portion of the property, present day prices were not considered, in fixing value for the purpose of recapture of income.

This is what is known as the "split inventory" method of calculating the rate base, adopted some years ago by the Wisconsin Commission and declared invalid by the courts.

The decision in the O'Fallon case in a nut shell, is this: The Court says to the Commission, in substance: In finding value for recapture purposes you are commanded by Congress to observe the law which applies to the finding of value for rate making purposes. This you have not done, because you have not considered cost of reproduction. Therefore your findings of value cannot stand.

Referring to the report of the Interstate Commerce Commission in the case, the Court in its majority opinion says:

> "The report of the Commission is long and argumentative. Much of it is devoted to general observations relative to the method and purpose of making valuations; many objections are urged to doctrines approved by us; and the superiority of another view is stoutly asserted.
>
> "It carefully refrains from stating that any consideration whatever was given to present or reproduction costs in estimating the value of the carrier's property. Four dissenting

> Commissioners declare that reproduction costs were not considered; and the report itself confirms their view. Two of the majority avow a like understanding of the course pursued."

Referring to the minority opinion of the Commission, the Court says:

> "Unfortunately, proper heed was denied the timely admonition of the minority—'the function of this Commission is not to act as an arbiter in economics, but, as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction.'"

THE Court, as stated, holds that Congress has directed that values shall be fixed upon a consideration of the present costs along with other pertinent facts; and that this mandate must be obeyed.

It will be observed that the Court does not hold reproduction cost to be the measure of property value. Justices Holmes, Brandeis, and Stone dissent from the majority view on the general ground that sufficient consideration was given by the Commission to the cost of the reproduction factor.

It has been said that the O'Fallon decision is important both to the railroads and the other utilities. It is important in the sense that it does not reverse the established rule, and repudiate present value as the basis of calculating the return; but it does not give the utilities anything they did not already have.

AS far as the utilities are concerned the importance of a present-value theory of rate making is greatly exaggerated. Valuations of utility property are becoming less and less the ruling passion in rate making. The utilities are not generally insisting on a rate base measured by the full value of their property. If such a value would produce higher rates, the companies do not always desire to put such rates into effect because the companies regard the establishment of high rates as bad business policy. Valuation is more often used as a shield against what the companies term unreasonable attacks on rate schedules than a means of obtaining the last penny from the ratepayers.

In the meantime it must not be forgotten that values may drop. Already there have been instances in which present value is less than original cost. If values happen to fall, perhaps the utility customers and the companies will again change sides on the value and prudent investment theories.

H. C. S.

¶ *The full text of the opinion in the O'Fallon case will appear in the issue of* PUBLIC UTILITIES FORTNIGHTLY *of June 13.*

HENRY C. SPURR
Editor

KENDALL BANNING
Editorial Director

ELLSWORTH NICHOLS
Associate Editor

FRANCIS X. WELCH
Contributing Editor

M. M. STOUT
Assistant Editor

Public Utilities Fortnightly

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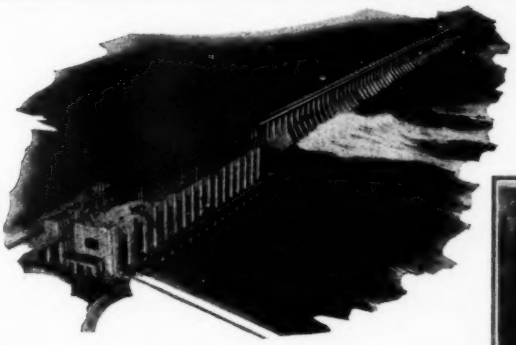


Generating plant and dam of the hydro-electric development at Conowingo, Md.

Partial view of one of the two Exide Control Bus Batteries used.

..At Conowingo *Exide Batteries* handle this vital job

Oil circuit breakers at this huge, new hydro-electric plant are operated by Exide Batteries

At Conowingo — most modern and one of the largest hydro-electric plants in the country — the vital job of oil circuit breaker operation is handled by Exide!

Two Exide Control Bus Batteries, each of 120 cells and rated at 632 A. H. capacity, were installed in the generating plant at the dam. At each of the new Plymouth Meeting and Westmoreland Stations—transforming and distributing points in this great development—there are two other 120-cell Exides of somewhat smaller capacity, also used for oil circuit breaker operation.

The Philadelphia Electric Company, operators of the new Conowingo development, now use a total of *over forty* Exide Batteries for control bus and emergency lighting service in their generator plants and sub-stations.

Exide dependability the reason.

The engineers of The Philadelphia Electric Company chose Exide Batteries because of their *dependability.*

That is also the reason the vast majority of central stations throughout the country use Exide Batteries. Whether it's excitation, emergency lighting, oil circuit breaker operation—or all three—Exides always justify their reputation for *long, dependable service.*

Exide

BATTERIES

THE ELECTRIC STORAGE BATTERY COMPANY, Philadelphia

Exide Batteries of Canada, Limited, Toronto

Pages with the Editor

In this issue of Public Utilities Fortnightly appears—for the first time in any magazine—what has been known to public utility executives throughout the country as "Mr. Spurr's Letters."

* *

These letters have, until now, been mailed weekly, as a special, personal service to those utility heads who want a brief, pointed summary and interpretation of events of outstanding significance in the public utility field.

* *

Each letter has commented upon some current happening, analyzed it, pointed out its important features and shown wherein it bears upon the problems of the utility interests—if at all.

* *

Each letter has, in fact, been written for the man of heavy responsibilities who is "too busy to read the magazines."

* *

The inclusion of these letters in this magazine (in which they will hereafter appear as a regular and exclusive feature), will thus place at the disposal of all of our readers a service which has been heretofore confined to a highly-select few—and at a price that has been exactly that of the subscription price of this magazine.

* *

Thus every subscriber to "Mr. Spurr's Letters" will continue to receive both the letters—and the magazine too—at the price that he has been paying for only one of these two services.

* *

In order to maintain the intimate, personal character of these letters, they are making their *debut* in this issue in fac simile typewritten form.

* *

One of the subjects that is now commanding the nation-wide attention of public utility men is the matter of "regulation" of a holding company.

* *

Specifically, of course, a holding company that owns securities of public utility corporations.

* *

One of the most comprehensive and authoritative studies of this complex problem will be found on pages 620-631 of this issue of Public Utilities Fortnightly. It is written by William M. Wherry, of the New York Bar.

Mr. Wherry's qualifications for writing on this topic may be best expressed in the following summary of his activities:

* *

University of Michigan, B.S., 1898; at Cincinnati Law School, 1899; Columbia Law School, 1900. Author of "Public Utilities and the Law," published by Nicholas L. Brown, N. Y.; "Public Utility Regulation as Process of Law," *New York University Law Review*, March, 1925; "Principles of Rate Making," *Journal of New England Water Works Association*, Volume XL, No. 3, 1926; "Review of Court Decisions Affecting Utilities, 1926-1927," *Proceedings of the New Jersey Utilities Association*, November, 1927; "Principles Applicable to Consolidation and Merger of Public Utilities," *New York University Law Review*, January, 1929; and numerous other articles in various periodicals.

* *

"The Public Utilities Fortnightly's articles on public utility regulation are of outstanding value to all interested in this rapidly growing and important branch of law and economics," writes Chairman J. F. Shaughnessy, of the Public Service Commission of Nevada.

* *

"Because this service alone occupies a field within which the public will be impartially informed how effective regulation is exercised, and because it will keep the public in intimate touch with the improvements that are taking place in those major public services, which in our modern day life have become the equivalent of public necessities, it is of major importance."

* *

And from a nationally known financier, who was once the president of the Investment Bankers' Association of America, comes this cheering note:

* *

"Puclic Utilities Fortnightly is my principal source of information concerning facts and problems of public utility regulation."

—Henry R. Hayes,
Vice-President, Stone & Webster and Blodget, New York.

* *

Beginning with this issue, Public Utilities Fortnightly will reach its readers about a week earlier than heretofore; the

(*Continued on page VIII*)

publication dates, however, will not be changed.

* *

AT about the time this number of the magazine reaches its readers, the annual convention of the National Electric Light Association will be in full swing at Atlantic City, and the "Golden Jubilee of Light," marking the semi-centennial anniversary of the incandescent lamp, will be in course of celebration.

* *

IN honor of this happy occasion, those copies of PUBLIC UTILITIES FORTNIGHTLY that will be distributed at this function will be encased in a gold band—"all dressed up" but with a very definite place to go.

* *

MORE plans are afoot now than ever before, in the nation's Capital, to place public utilities under more rigid regulation, and especially to curtail their means of access to the public.

* *

ONE of the proposed measures, which seeks to prevent a public utility from owning or operating a broadcasting station, is sponsored by SENATOR HUGO L. BLACK of Alabama.

* *

IN order that our readers may learn about this plan at first hand, SENATOR BLACK has written an article about it. His contribution will appear in the coming issue—for June 13th.

* *

AND in the next following issue—for June 27th—some views that are quite at variance with the Senator's will be expressed by HON. H. A. BELLOWS, formerly of the Federal Radio Commission.

* *

AMONG the more significant decisions that are published in this number of PUBLIC UTILITIES FORTNIGHTLY are the following:

* *

A PROPOSAL of lower rates for ornamental street lighting precipitated the Los Angeles Gas & Electric Corporation into a discussion of its entire rate structure. (See page 1 of "Public Utility Reports," in the back of this issue.) The Commission deemed the proposal of lower rates for a single class of business to be of such a striking nature that an investigation of the entire rate structure should be made.

* *

IN dealing with various problems, averages must be relied upon. This is true in computing depreciation, and the California Commission holds that a chance variation from the average of any particular class of equipment or a single item must be disregarded and full force be given to the expected life span of many items going to make up the complete property. (See page 3.)

THE location of transmission lines along public highways involves matters not only within the realm of a regulatory Commission, but also interests which are under the authority of local officials. This problem is dealt with by the Iowa supreme court in Central States Electric Co. *vs.* Pocahontas County. (See page 13.)

* *

MARKET centers and the requirements of intercommunity interests constantly raise perplexing questions for telephone companies to answer in arranging toll charges and interexchange service. The Wisconsin Commission in this issue has given consideration to this problem. (See page 40.)

* *

CONFLICTING rights of a private company and a municipal plant are disposed of by the Colorado Commission in Re Public Service Company. (See page 48.) Evidence purporting to show a conspiracy to force the sale of the municipal plant is considered by the Commission to be irrelevant.

* *

THE "blue pencil"—the symbol of editorial authority—is in reality wielded not alone in the interests of the reader, but also in the protection of the author.

* *

AS a matter of truth, the blue pencil is used largely to correct misstatements of fact, to rectify figures that are written in haste or in ignorance, and to delete passages that are inaccurate or misleading, or that may cause needless personal affront.

* *

IN no case is the blue pencil used in this particular Editorial Sanctum either to alter the intent of the author, nor to insert opinions or observations that are not truly his own.

* *

MISINFORMATION is a weak weapon with which any writer, whatever his views are, can defend himself. He whose position is fortified with errors will inevitably be disarmed.

* *

"I git along the best," said Josh Billings, "by asserting things az they strike me, and i say upwards ov four thousand things every year i kant prove."

* *

IT is part of the Editor's job to confine his authors' statements of facts to facts that he "kan prove."

* *

AND the fact that no contributor to this magazine has yet objected to these blue-pencillings is a tribute to his desire for accuracy. And perhaps just a *soupçon* of credit is also due to

—THE EDITORS

MAY

Utilities Almanac

Reminders of Coming Events — *Notable Events and Anniversaries*

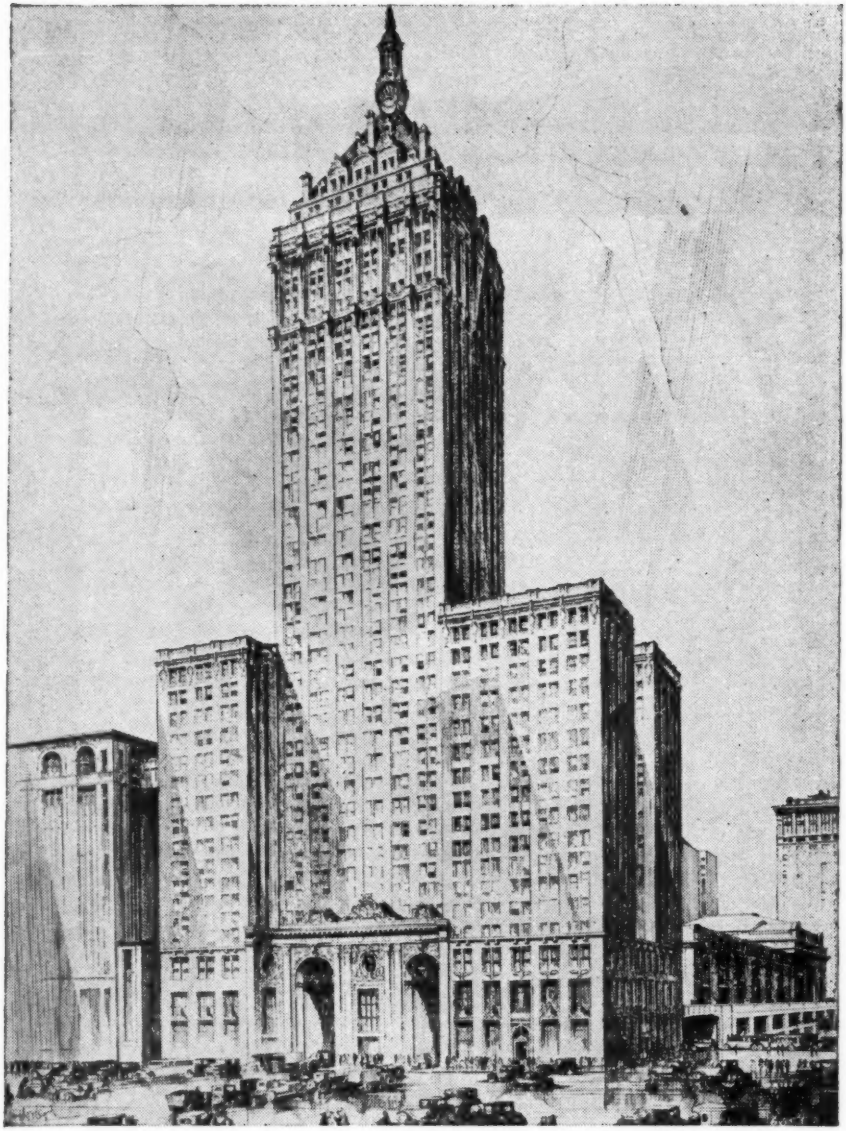
30	T^{h}	*Public utility financing began with the gas, street railway, telephone and electric light companies at about this time of year, 1885.*
31	F	The "Great Western" established a record in trans-Atlantic travel by steaming from Bristol to New York in 13 days and 8 hours, 1839.

JUNE

1	S^{a}	First telephone exchange in Vermont opened at Burlington, 1879. ¶ *Annual Convention of the A.W.W.A. will open in Ontario, June 24, 1929.*
2	S	The basic principle of the electric telephone was discovered by ALEXANDER GRAHAM BELL, 1875. ¶*The A.G.A. Convention will open October 14, 1929.*
3	M	¶*The 52nd annual convention of the National Electric Light Association opens its sessions in Atlantic City, N. J., today.*
4	T^{u}	The first sleeping car to be placed in service in the United States, the "Silver Palace Sleeping Car," arrived in Sacramento over the Southern Pacific lines, 1869.
5	W	The first steel passenger coach was turned out of the Pennsylvania Railroad's Altoona plant; it was 67.5 feet long; 1906.
6	T^{h}	WM. F. HARDEN, with a carpet bag, started the first railroad messenger service, (which developed into the American Express Co.), between N. Y. and Boston, 1839.
7	F	The first electric power plant in Europe was started in Dijon, France; the units were made by EDISON and were shipped from New York, 1883.
8	S^{a}	The first steam turbine A. C. unit to be used as a central station prime mover in the United States was installed at Hartford, Conn., 1901.
9	S	The first cargo ship to operate on scheduled time left New York for New Orleans, 1820. ¶*The A.E.R.A. convention will open in Atlantic City, Sept. 28, 1929.*
10	M	The Federal Water Power Act was passed, giving jurisdiction to the Commission over public lands and reservations in the United States, 1920.
11	T^{u}	A decision of the Supreme Court of Alabama (in the case of the Mayor of Mobile *v.* Yuille), declared that a baker was a "public utility," 1841.
12	W	The "Pennsylvania Limited," running between New York and Chicago, was the first train in the world to be fully equipped with electric lights, 1882.

"The instinct for individual reward was implanted in man for a purpose—to induce the individual to develop the resources, build the industries, make the discoveries, and through the results of his individual efforts, to become a helper of his kind."

—P. S. ARKWRIGHT.



From a drawing by Earl Horter *Courtesy of the New York Edison Company*

CITADELS OF SERVICE

No. 4: *Like a modern Colossus of Rhodes, this towering structure, known as the "New York Central Building," spans Park Avenue just north of the Grand Central Station, near the center of the uptown public utility office district.*

Public Utilities
FORTNIGHTLY

VOL. III; No. 11 MAY 30, 1929

The PUBLIC UTILITIES AND THE PUBLIC

THERE is a pretty general impression among those interested in the comparatively new science of radio broadcasting that the regulation of this subject has so far left a great deal to be desired. This young industry has grown with such leaps and bounds and it is so intangible in its character that a definite and satisfactory policing of the air is something not to be attained without difficulty.

In an article appearing in these pages some months ago,* a rather detailed account of the repeated failures to regulate radio was given and the various problems necessary to be solved were analyzed. The old act of 1912 was primitive and inadequate. Attempted regulation by the Secretary of Commerce in 1920 was declared unwarranted by the judiciary. And now the almost brand new Federal Radio Commission seems to be doubtful of its own constitutional powers under the Act of 1927.

Not only that but Federal radio regulation at this time is a power that seems to be split up into three different agencies causing often a duplication of effort and sometimes an overlapping of jurisdiction. First there is the Federal Radio Commission; next, the radio division of the Department of Justice, and finally the Department of State controlling various mediums of transportation.

There is little doubt in the mind of the average citizen that radio broadcasting needs policing. In spite of the somewhat bashful attitude of the Federal Radio Commission, the recent reallocation of wave lengths was the result of a nation wide protest of public opinion against the overcrowding of the available ether channels, against "wave jumping," against outright "air pirating," and against other broadcasting abuse that caused such a bedlam

* Who Will Regulate Radio Broadcasting —And How? Public Utilities Fortnightly, January 24, 1929.

of confusion before the Commission cleaned up the wave channels to some extent. To insure reasonable receptive conditions and general satisfaction among the radio listeners, it is the prevailing impression among those who should know that about three hundred stations now operating will have to be ordered to get off the air.

All of which brings up for earnest consideration the latest bill introduced by Senator Couzens of Michigan in the United States Senate to provide for the regulation and transmission of intelligence by wire or wireless. This bill in its present form would create a new five-man Commission to be known as the Commission of Communication and its function would be to regulate transmission of intelligence by wire and wireless in interstate and international commerce. One of the principle objectives of Senator Couzens' bill is to unite under one Federal agency all of the scattered functions already mentioned. The Radio Act of 1927 now in effect is used as a sort of nucleus for the proposed new bill, and in many places it is quoted section by section but there is evidence of considerable constitutional bolstering and it seems to have considerable more teeth in it.

For the purposes of this act the United States is divided into five zones, the first zone embracing New England and the Southern Atlantic states; the second zone, Pennsylvania, Virginia, and the Ohio Valley states; the third zone, the south and southwestern states; the fourth zone, the middle western states; and the fifth zone the west coast states and Pacific territories.

No more than one Commissioner can be appointed from any zone, and no Commissioner can be financially interested in manufacture or sale of radio, telephone or telegraph apparatus. Commissioners are to be appointed by the president for a term of six years, alternately every two years, and may be removed only for neglect in office. The Commission has authority to inquire into the management of the business of all communication agencies subject to its jurisdiction. The Commission also has power to classify radio stations, to prescribe the nature of services to be rendered, assign wave lengths, determine location, regulate apparatus, suspend the license of operators violating regulation, designate call letters and prescribe general rules and regulations for the conduct of communication service.

Another interesting feature of the proposed bill is the declaration that no broadcaster shall have any property in any particular wave length or the right to use any particular wave length. This has been a highly debatable question in the development of radio law. Those stations broadcasting prior to Federal regulation have been claiming vested rights in the use of ether channels.

Senator Couzens provides for this contingency by making all broadcasters obtain a new license every three years and then the bill provides that "no station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length of the ether as against the regulatory power of the United States because of the pre-

vious use of the same whether by license or otherwise."

This section would seem to give the contemplated Commission more latitude in clearing the air of unnecessary stations whenever the occasion arises. There is a provision against unlawful monopoly or attempts at unlawful monopoly in radio or telegraph communication directly or indirectly. Appeals from the rulings of the Commission are to be made to the Court of Appeals of the District of Columbia. Stations permitting the broadcasting of political programs are required to afford equal opportunities to all parties.

There are some provisions as to rate regulations but they apparently apply only to those intelligence agencies which are engaged in the "transmission of intelligence for hire." The bill states that all charges made for services rendered shall be just and reasonable and unjust and unreasonable charges are prohibited. This, of course, has principal application to commercial telegraph and radio companies and will have no direct effect upon the general radio listeners who will still get free service. However, these sections may have some bearing upon the rates charged by broadcasting stations for the sale of time, in the broadcasting of commercial programs for advertisement.

The Commission is to be given jurisdiction of the security issues of intelligence agencies involved. There is also authority given to value the property of such companies presumably for rate-making purposes.

Senator Couzens stated that he would offer several other amendments to the bill and Senator Dill of Washington declared that he would also offer several amendments. Senator Dill was desirous of investigating the international situation on the proposed agreement between the RCA Communication, Incorporated, and the International Telephone & Telegraph Corporation. The bill has been referred to the Interstate Commerce Committee of the Senate and hearings are in progress at this writing.

Factor of Economic Compensation in Grade Separation Costs

THE factor of social compensation seems to be playing a part of increasing importance in many phases of public service regulation. This factor bobs up in the most varied situations and its solution is invariably difficult owing to the delicate character of the task of adjusting the benefits and burdens of utility service in due and proper proportions where more than one political subdivision is involved.

The problem was first discussed in the PUBLIC UTILITIES FORTNIGHTLY (February 21, 1929) by Richard Lord in a brief article, "How the 'Factor of Economic Compensation' Works," in which the problem of rate adjustment by a utility serving the metropolitan area of a Kansas city having a suburban community population equal to its own size was analyzed. The economic compensation of closely related communities has long puzzled state legislatures in attempting to tax them in equitable ratio for highway build-

ings. It was pointed out that the state and Federal aid projects and the gasoline tax had just about solved the latter difficulty.

The next appearance of the social factor was in a case in New York where the Commission of that state refused to permit the abandonment of a local station in view of the fact that the social welfare of the whole area was involved because of a sanitarium at the station in question. The latest appearance of this puzzling factor is a grade separation case in California. The Commission had apportioned the cost in the following way: Southern Pacific Company, 50 per cent; county of Los Angeles, 25 per cent; city of Los Angeles, 12½ per cent; city of Glendale, 12½ per cent. The city of Glendale objected to this arrangement taking the position that it was not equitable to assess Glendale as much for these separations as the city of Los Angeles, due to the fact that the city of Los Angeles practically surrounds Glendale and it was claimed that Los Angeles people would obtain greater benefits than the people of Glendale from the improvement proposed by reason of actual use.

The Commission held, however, that an apportionment of costs of grade separation between two adjoining cities based upon the assessed values of the respective cities, would be unfair to the larger city.

Commissioner Seavey pointed out that the contention of Glendale that Los Angeles people would be more benefited from the improvement than Glendale people was in fact not true. He further stated:

> "With respect to the contention that the apportionment of cost should be based upon the assessed valuation of the respective cities, I am unable to agree, for the simple reason that mere wealth can not determine the obligation of a community in safeguarding travelers upon its public thoroughfares. It is apparent that an apportionment of cost upon such a basis would be unfair to the larger city, as it is not unreasonable to assume that each city has its own problems of grade separation somewhat in proportion to the size of the city."

Los Angeles County Grade Crossing Committee *v.* Southern P. R. Co. Decision No. 20770, Case No. 2124.

Utility Permitted to Quit Customers to Avoid Duplication of Service

THAT the principle of protecting a monopoly by law and restricting competition is linked up with the general public interests often requires a truly broad point of view to appreciate. It's so easy in dealing with organized complaints by local groups of the public against the utility for something or other to lose sight of the fact that utility service is like the gruel in Oliver Twist's school. When anyone takes more than his share somebody else has to go short. Decisions of the Commission denying these complaints by local groups of the public are frequently pictured as contrary to public interest when in fact they are safeguarding that very thing—the interest of the *whole* public and not of a particular locality.

A typical situation recently arose in Nassau county, New York where Powell's Creek had long been regarded as the sort of natural boundary between the service areas of the Queens Borough Gas Company and the Nassau & Suffolk Company respectively. Sometime ago a war broke out between these companies and the Queens Borough Company crossed this Rubicon and annexed a few customers on the east side of it. Later, through a merger of financial interests the warfare ceased and the companies mutually recognized that any continued activity of the Queens Borough Company on the east side of the creek was a wasteful duplication of facilities already established by the Nassau County. An antiduplication agreement was reached whereby the Queens Company agreed to retire to the west side turning over such customers as it had already acquired to the Nassau Company.

This arrangement suited the Commission but it didn't suit the customers. They were getting Queens Borough service for $1.30 a thousand cubic feet and the substituted Nassau service would cost them $1.75. They complained to the Commission taking the position that as long as the Queens Borough Company had come into that area at the $1.30 rate it should be compelled to continue service at that rate at least to such patrons as were already attached to its mains.

Commissioner Van Namee admitted the force of this position but pointed out that the duplication of mains by the requirement of double service in that area was an expense which the general customers would have to help pay for. He decided that the Queens Borough Company should be permitted to quit that sector in view of the unsound and uneconomic duplication of investment, effort, and expense that would otherwise be required. This was a little hard on the customers east of Powell's Creek but the general ratepayers will get the advantage, which is as it should be.

Hempstead *v.* Nassau & Suffolk Lighting Co. Case Nos. 5479, 5480.

Restrictions for Metropolitan Taxi Service Not Identical With City Line

WHILE the imaginary lines designated "city" or "corporate limits" mark and determine the outer boundaries of a municipality, it is a well-known fact that the cities and towns of the state, viewed as communities, extend in area considerably beyond mere corporate lines and that the interests and needs of those living immediately contiguous to the city limits are substantially identical with those residing within the corporate limits both socially and economically.

Granting a certificate for metropolitan taxi service in the city of Billings, the Montana Commission gave the operator free reign over the entire metropolitan area, and the Commission pointed out that the public utilities quite generally in their professions of public service do not recognize artificial boundaries and it appeared to the Commission as being particularly inapt in the instance of a

taxi service to attempt to limit such service within artificial lines. Taxi service, in its very nature, contemplates flexible service responsive to the particular needs of the communities in which operations are carried on. It would be intolerable if a person desiring transportation to a point beyond the city limits would have to pick and choose among the taxi companies holding themselves out to the public for one that is licensed to render the particular service. It was believed, in view of the specific qualification provided by the Montana legislature, that the needs and convenience of the public at large in given communities will be best promoted by a ruling that city taxis are to be permitted, when licensed by the Board to operate within the city and to points immediately tributary thereto.

Re Huff, Docket No. M.R.C. 298, Report and Order No. 1535.

Discrimination in the Requirement of Advance Deposits

THE New Jersey Board has handed down a decision sustaining the action of a telephone company in requiring $150 deposit from a hotel to secure the payment of its toll bill. The manager of the hotel took the position that since other hotels were not obliged to make such a deposit, unfair discrimination existed. The Board pointed out that other hotels did not have the record for irregular payments which the complainant had and it was stated that the requirement of a deposit in advance for supplying service from some of the customers of a public utility and service to others without such requirement is not *ipso facto* a discrimination such as is prohibited by law.

"For an unreasonable and unlawful discrimination to exist," says the Board, "it should appear that the conditions are identical. In the case before us, it does not appear that the conditions, with respect to the supply of service by the telephone company to the complainant, are identical with the supply to the other hotels referred to. It does not appear the others delayed payment of the company's bills. Without improper discrimination, the company might extend credit to those who pay their bills promptly, and withhold credit from those who do not do so. Material delay in payment of bills might lead, not unreasonably, to the company's questioning whether the delay would not be further prolonged and eventually result in failure to pay an account due."

Asbury-Carlton Hotel *v.* New Jersey Bell Teleph. Co.

Radio Fans Call for Alternating Electric Current in Domestic Service

IT is commonly believed that, from a standpoint of electric service as a whole, alternating current is more satisfactory and economical than direct current. Of course in large cities where there is a concentrated power demand in certain downtown districts it is necessary to keep up direct cur-

rent service to domestic and commercial consumers alike. This, however, is a managerial matter and the question of whether the Commission should approve of divided service areas having alternating current in one and direct current in another must be decided upon in the broad basis of efficiency and economy of the system as a whole and the quality of the service rendered, with due regard to the requirements of the particular situation as well as general needs.

Heretofore it has usually been the electric companies who agitated for a change from direct to the more economical alternating service for their general system, and it has usually been customers, using commercial appliances more adaptable to direct current, who have resisted such changes.

In New Jersey, for instance, the Commission ruled that an electric company could not be compelled to furnish a new customer with direct current instead of the more economical alternating current notwithstanding the fact that the installation of alternating machinery was more expensive to the customer.

But within the past few years, due to the fact that the domestic electric service in most large cities is overwhelmingly alternating current, appliances have been designed to use such current. The wide sale and quantity production of alternating current appliances have made them cheaper in most cases than direct appliances. Chief among these is the radio receiving set. The well known "A. C." set is practically standard household equipment in America today. Comparatively few manufacturers are making "electric sets" that function on direct current and the limited demand for such equipment makes the price of the D. C. electric set quite high as compared with the more widely sold A. C. electric sets.

Then too, domestic customers living in D. C. service areas are very few compared with those in A. C. areas. Such a patron is loath to put out a considerable sum of money for the specialized D. C. electric radio when there is always a risk that he will later move out of the D. C. zone or that there will be a change in current by the company. As a result he must operate his set upon batteries which has led to much complaining for alternating current in domestic sections now receiving direct service.

Thus the domestic demand, due not only to the influence of radio but also to the availability of other appliances mentioned, has changed from direct to alternating current. A recent case in Indiana brought such complaints of the citizenry directly before the Commission of that state. In response to this insistent demand the Commission ordered the electric operator in a small town to install alternating service instead of the direct current previously generated. Commissioner Ellis was of the opinion that under the circumstances, public convenience and necessity demanded the change.

Border *v.* Martin, No. 9664.

The Movement for Uniform Air Laws Is Under Way

THE growth of administrative rather than legislative or judicial activity in applying the law in modern America is unquestionably due to the fact that courts and legislatures, however competent they may be to discover the facts of particular cases before them, are neither qualified nor adapted for fact finding of a general nature. The increasing complexity of present day civilization has so jammed the legislative mills, and court dockets that the tendency to "appoint a Commission" or to "refer to a special master" has become more pronounced as the only way to deal with situations involving technicalities beyond the ken of the average jurist or solon.

So congested is the docket in the courts of New York city that two years is the average minimum time in which a case can be reached from the date of filing, and notwithstanding this tie-up, the court cases represent only a small part of a day's legal business. Far more controversies are settled over the council tables of the adverse parties or in the offices of their attorneys than ever reach the official tribunal. Court cases, it has been said are in truth, but occasional units that raise their heads for court inspection out of the ceaseless and resistless flow of a mightly stream of legal process.

Then there is the persistent demand for a restatement of all existing laws, both statutory and judicial. If some modern Justinian would arise to cast all of this great mass of jurisprudence into uniform molds applicable alike in the forty-eight states, the dispensation of justice would be greatly simplified and certainly better understood by the laymen. Lawyers themselves are conscious of this great need and the American Bar Association has started many movements towards this end. The results have been very gratifying in some instances. The Uniform Sales Act and the Uniform Negotiable Instrument Act adopted by most of the states have been a great aid to modern commerce.

Professor Howard Lee MacBain says of this situation:

> "The profession is however appalled at the growing volume and the rate of increase of legal literature—the materials with which lawyers must deal. In America the Federal system of government with forty-eight separate state jurisdictions and a distinct national jurisdiction is in part responsible for this unwelcome surfeit. If, by some alchemical process, all of the dross —the useless rhetoric, the endless reiteration, the obiter dicta, the pomp and circumstance of legal learning—could be extracted from the law books that clutter the groaning shelves, the problem of simplifying the law of the past and present would not be so staggering, though obviously it will still be a mammoth task. If judges who are in fact not overly learned could be induced to forswear a vain show of learning, and if all judges, learned and otherwise, could be persuaded to greater brevity and more frequent silence, the future might not appear so loury. There are eminent lawyers and jurists who believe that English and American law can and must be simplified. The attempt is already under way. Its ultimate form and its measure of success remain to be revealed."

But whether or not there can be such a thing as successful restatement of general laws, the facts remain, that at least in the case of new born utilities, presumably the radio and the aeroplane, the acceptance by all states of a uniform law governing their activities is both feasible and desirable. These agencies are as yet unclogged by any appreciable mass of precedent, and the way to regulate them on a basis common to the entire forty-eight states is open and clear. To quote from an editorial appearing in these pages: (PUBLIC UTILITIES FORTNIGHTLY, January 24, 1929.)

> "Commercial air service to develop soundly and successfully must be regulated scientifically just as every other type of utility is regulated, and now is the time to do it before the air is cluttered up with a legion of adventurers flying junk and death-traps and claiming priority rights that will take the courts years to untangle."

Consequently it is pleasing to note the action taken by the Honorable Fay Harding, Chairman of the North Dakota Commission in starting a movement for a uniform law "concerning the licensing of airmen and aircraft." Chairman Harding late last January addressed a letter to the Chairman of each State Commission setting forth certain facts collected by Mr. John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners relative to the regulation of aircraft by the several states. Commenting on a proposed legislation which he arranged to have introduced at the current session of the North Dakota Legislature, Chairman Harding states:

> "The proposed uniform act referred to deals only with the licensing of airmen and aircraft, the intent being simply to require that all airmen as defined in the act shall be properly qualified, whether they are engaged in common carrier service or engaged in making short 'hops' at county fairs and the like, and that all aircraft shall be serviceable. After consultation with several lawyers it was deemed advisable not to include in the proposed uniform act any provision concerning the regulation of aircraft as common carriers, for the reason that some of the states already are regulating such carriers under existing statutes, while others may have different views as to the proper regulation of such carriers, which might well be expressed in separate bills."

A copy of the proposed act was sent to each Commission for such action as might be deemed proper. It is hoped that this intelligent and farsighted move by Chairman Harding will receive the active support of every State Commission. Nothing will give greater impetus to the final adoption and success of a uniform law of the air applicable alike throughout the land as a result of the common sense co-operation of every one of the forty-eight states. The proposed bill is modest in form and limited in scope but it marks the beginning of what may result in a Uniform Act for the Regulation of Airmen and Aircraft.

The REGULATION OF

¶ May holding companies that own securities of public utility corporations be properly classified as "public utilities" themselves?

¶ If so, do they come under the jurisdiction of state regulatory Commissions?

¶ If not, should laws be enacted that will enable the State Commissions to exercise control over them?

¶ These questions are becoming of increasing moment as the holding companies grow in number, size, and importance.

¶ The enormous benefit that holding companies may be in the development of utility enterprises, as well as the dangers which they may threaten to the public, are ably set forth in the following article by a well-known attorney, who views the situation here in its legal aspects.

By WILLIAM M. WHERRY

I.

THROUGHOUT the country there is much agitation because of the assumed need of control of Public Service Commissions over holding companies. In one state after another, legislation has been recommended to declare that holding companies are public utilities, and to subject them to investigation and control by the State Public Utility Commissions.

Such a program presents many problems. The holding company furnishes distinct benefits to operating companies, and has made possible the recent phenomenal extension and improvement of service. Take the case of two utilities of the same state, one locally owned and managed, the other supervised by a well-established holding company. The local company is unable to employ the best engineering talent or to keep constant track of commodity prices, or to purchase large quantities of supplies in advance of its needs to take advantage of a favorable market. When confronted with the need of making extensive additions or betterments to its plant, it has to purchase supplies at the time, regardless of whether the market is favorable or otherwise. It may also miss a favorable market for its securities by reason of delay in getting its application approved promptly by the Public Service Commission. The Commission may attempt to fix the price at which its se-

curities are to be sold and it may then find itself unable to finance because of too high an asking price.

CONTRAST the lot of such a company with one supervised by a well-organized and operated holding company.

The latter employs the best engineering talent. Its engineers are studying rate and service problems not merely locally, but all over the country, and are able to advise as to the best form of rate schedules, as well as the best type of equipment. They are also able to keep in touch with the commodity markets, and can purchase to better advantage such things as copper, pipe, or the like. In one instance a holding company made savings on copper alone purchased for operating companies supervised by it exceeding the entire amount of its fee.

In financing, holding companies can advance on open account money necessary to make needed improvements and await a favorable market for the issuance and sale of securities. They are thus independent of the delays on hearings before Commissions upon security issues. At the same time, when reimbursing themselves for advances on open account by the issuance of securities of the operating utility, it is immaterial as to the price at which such securities are taken.

Holding companies are also able to assist in cases before Public Service Commissions, so that the points are more thoroughly and efficiently presented, and they can also afford appeals where the decisions are adverse.

It is clear that the utility supervised by a holding company is in a more independent position before a regulatory body. Too often a local utility is compelled to acquiesce in orders of a Commission, even though they be erroneous. This seldom happens to the subsidiaries of holding companies.

It is not strange that those who conceive the function of regulatory Commissions to be that of management, feel that the whole plan of regulation is a failure if companies can be thus independent.

THIS is not the ground upon which the demand for regulation of holding companies is based. That demand rests on two charges:

First, that the holding companies are able to issue securities independently of the Commissions, and, therefore, may defraud the public; and

Second, that they may by contracts with operating companies enable the latter to pad expense accounts and conceal profits.

These are indeed real dangers. Undoubtedly there are instances of dangerous and unjustifiable pyramiding of security issues. Likewise, examples can be found of unjustifiably high operating expenses.

The problem of controlling security issues of a holding company does not present questions peculiar to the public utility field. It is part of the wider problem of control of the issue and sale of all corporate securities. The same questions, difficulties and

dangers arise with respect to the issuance of stock and bonds of all corporations.

The control of supervision and of engineering contracts, however, does present questions peculiar to public utility regulation. This paper will be confined to consideration of these questions.

II.

IN the example above given, the operating company was able to save on copper purchased a considerable sum by reason of having bought through a holding company. Suppose, the sale had resulted in a loss, that instead of copper going up, it had gone down, could the state interfere in any way with the making or carrying out of that contract?

It is apparent that if the contract had been one between two ordinary business concerns, the state could not interfere with it.

Every one is familiar with the general principle of law that the right of the state to fix a rate or charge for a service or commodity is a derogation of a constitutional property right and confined to cases where the subject matter of the contract is one clothed with a public interest. It is confined to cases where the public interest is so involved in the business that it is, in effect, devoted to a public use. The great bulk of business transactions cannot be directly interfered with by the state, and this is true whether the transaction involves the purchase and sale of commodities or the rendering of services.

For example, in Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, P.U.R. 1923D, 746, 753, it was held that the state could not fix the wages (even through compulsory arbitration) of employees engaged in the packing industry, the Court saying:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."

In Williams v. Standard Oil Co., decided January 2, 1929, 73 L. ed. —, P.U.R.1929A, 450, 453, the Supreme Court held that the state could not regulate the price of gasoline, and said:

> "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'"

As to the meaning of this phrase, the Court said:

> "Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect to its maintenance."

The principle applies not merely to the sale of commodities, but also to the sale of services.

OTHER recent illustrations are Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, where the Court held that the service of securing and re-selling theatre tickets, was not subject to regulation as to the price charged, and the case of Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, holding that employment agencies are essentially private businesses and their charges are not subject to be fixed by the state.

In the latter case the Court said:

> "An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control."

Under contracts for supervision and engineering, the holding companies purchase and supply commodities and render engineering and similar services. The commodities furnished and the services rendered are the ordinary commodities and services rendered to an infinite variety of businesses throughout the country, and are clearly within the class defined in the above cases as not ordinarily subject to regulation or to legislative price control.

No mere legislative declaration can make that a public utility which is not such in fact.

In so far as a holding company is engaged in such a business, it cannot be made a public utility by mere act of the legislature. Nor are its contracts subject to legislative control, if rendered to clients other than public utilities.

III.

WOULD this be altered if some department of its business was engaged in rendering a public service?

We would expect to find that this fact would not make those departments which were not public utilities subject to legislative control.

Assume, for example, that a gas company sold drugs, groceries or meats, and that each class of its business were kept entirely separate and distinct from the other, the state could have no greater right to interfere with the price charged for these commodities by this company than if they were sold by the ordinary druggist, butcher, baker, or grocer.

In Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256, P.U.R.1916D, 972, the Terminal Taxicab Company was engaged in the business of carrying passengers for hire, pursuant to contracts with hotels and railroad terminals. It also furnished a service from its garage pursuant to private calls. The Public Utilities Commission of the District of Columbia attempted to regulate the rates and charges for both classes of service.

The Supreme Court of the United States held that as to the business of furnishing carriage between hotels and railroad terminals, the company was a common carrier and subject to the jurisdiction of the Commission, but as to the balance of its business it was not a common carrier and that that business was no more subject to regulation by the Commission than if it had been conducted by an entirely independent enterprise.

Under this decision, it is clear that even if under some conceivable circumstances a holding company might be a public utility in some departments of its business, nevertheless, its contracts in general to furnish engineering, and similar services, would not be subject to regulation or legislative control any more than those of an independent engineering concern.

This principle applies wherever the two businesses are so conducted as to be clearly distinct. The only exception to the rule would be when the business which was clearly a public service was so commingled with the business that was not a public service as to render separation impossible; in which case the latter business might be subject to a certain amount of control.* The extent of the control will be more fully brought out in what follows. That it is quite limited appears from United Fuel Gas Co. v. Railroad Commission, 73 L. ed. —, P.U.R.1929A, 433.

IV.

We will now turn to the consideration of how far contracts are subject to regulation if the purchaser of the service is a public utility.

From an examination of the cases, it is clear that the ordinary contracts of a public utility are not subject to *direct control.* The broad principle underlying this is that management and regulation are distinct. Under the guise of regulation the state cannot usurp functions of management.

Since the property is in private ownership, the owner "is entitled to the privilege of managing its business in its own way, so long as it does not injuriously affect the health, comfort, safety, and convenience of the public." The power of regulation is limited to the protection of the public from such injury and "does not warrant an unreasonable interference with the right of management." *

This proposition is fundamental and has been stated in so many cases in the Supreme Court of the United States that it is not necessary to multiply authorities for it. Nevertheless, fundamental as it is, it is constantly overlooked by those who advocate extending regulation. The principle has been applied with respect to rate making, depreciation, operating expenses, issuance of securities, accounting and engineering problems. In each case where the matter was clearly presented the Courts have held that the state could not substitute its judgment for that of the owners and managers of the property.

Applying this principle, we find that such contracts as are ordinarily made with holding companies and the matters covered by them are not subject to *direct* interference by

* Interstate Commerce Commission *v.* Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729.

* Chicago, M. & St. P. R. Co. *v.* Wisconsin, 238 U. S. 491, P.U.R.1915D, 706, 713.

The Right to Investigate the Private Business of a Holding Company

"Legislation conferring unlimited power to investigate the private business of a holding company would raise serious constitutional questions.

"IN THE FIRST PLACE, *investigation merely for the purpose of recommending legislation is a legislative function which cannot be delegated.*

"IN THE SECOND PLACE, *such an unlimited power not in aid of any police power of the Commission, would be an unjustifiable interference with liberty on the right of privacy and void under the 14th Amendment.*"

the state. Such matters are universally held to be those of management.

By way of illustration, the kind of equipment, the make of equipment, the price which shall be paid for equipment, are all matters for the management and not subject to the dictation of the state.

As was said by the court in New England Teleph. & Teleg. Co. v. Department of Public Utilities (Mass.) P.U.R.1928B, 396, 405, 159 N. E. 743:

> "The determination whether certain wires are suitable and are properly installed is a detail of management in the administration of the business of the telephone company. To substitute the judgment of others for that of the company in that matter is an interference with the right of management which goes beyond the reasonable limit of public control."

Likewise, the determination of who shall be employed, his duties and the amount of his salary or compensation, are matters purely for the management.

The owner "must be allowed to exercise business judgment in deciding what employees are necessary to the conduct of the business and what is a reasonable compensation for them." *

No case has yet gone so far as to hold that the state can directly interfere with the operating contracts of a utility. Many cases have held that the state cannot dictate to a utility what supplies it shall buy, where it shall buy them, what employees it shall hire, or what it shall pay them.

This principle applies to the ordinary contracts for supervision or engineering services. The terms, including the charge made, are not subject to direct interference by the state. It would not make any difference whether that contract was made with another public utility, with an independent company, with a holding company, or with a subsidiary of a holding company which owned and

* Northwestern Bell Teleph. Co. *v.* Spillman, 6 F. (2d) 663, 665, P.U.R.1926A, 330, 335.

controlled both the contracting parties.

Therefore, such a contract is immune from *direct* interference by the state.

V.

How far can the state go in *indirect* interference with these contracts?

The state, in connection with the control of the rates charged by a public utility, exercises an indirect control over all of its business. Even with respect to this control, however, the Courts have held that the state cannot usurp the function of management, nor ignore a fair exercise of judgment by the owners.

Under the modern development of rate making, the state in general cannot force a rate on a company which is insufficient to cover its operating expenses and a fair return. From this it follows that in determining what sum is necessary to cover operating expenses and a fair return, the state can examine all of the operations of the company whose rate is in question. In other words, in testing the reasonableness of a rate, the state may, in a proper case, disallow certain operating expenses in whole or in part. For instance, in Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 346, 36 L. ed. 170, the Court held that the company could be compelled to submit an analysis of its operating expenses so that the Court could determine whether they were fair and reasonable in testing the constitutionality of a statutory rate. The Court said:

> "While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

This statement suggests at once the power and the limitation on the power of the state with respect to contracts. If any contract calls for exorbitant and unreasonable charges, then, in fixing a rate, the state may disallow as operating expenses the excessive sums so charged.

On the other hand, so long as the charges are within reasonable limits of ordinary management, the state cannot substitute a lower charge for what was actually incurred.

The Courts, in later cases, have definitely held that the state can only disregard actual operating expenses where there is fraud or gross abuse of discretion.

In judging the fairness of any contract, the Commission is confined to the question whether the contract itself is fair, from the standpoint of the operating company, and the profit which the other party to it makes is immaterial. It makes no difference whether the contract is made with an outside concern or with a holding company, nor does it make any difference whether it is made with a subsidiary whose stock is owned by the same holding company that owns the stock of the utility.

In every case, if the contract is not fraudulent, or so unreasonable as to amount to abuse of discretion, the expenses under it must be allowed, and it is not subject to indirect interference.

The state must, as a prerequisite to the interference with the property in private ownership, establish the fact that the contract was unreasonable or exorbitant. The companies do not have to show the fairness of the contract. Nevertheless, there has developed a practice in rate cases on the part of the companies of actually taking the burden of proof and affirmatively showing the fairness of operating contracts, especially when made with holding companies.

In some cases, Commissions have held the fact that an operating contract was made with a subsidiary of a holding company which also controlled the operating company, is conclusive that the charges under such contract are exorbitant.* There is no basis for any such rule of law.

As a matter of evidence, it is sufficient if the company makes a full disclosure of its operating expenses as reflected by its books. Then, if the state asserts that an item of expense is unreasonable, it has the burden of proving it.

The mere fact that the operating company and the holding company are jointly controlled cannot create a conclusive presumption which would take the place of the fact which is necessary as a prerequisite before the state can deprive the company of its property by fixing so low a rate as to make it impossible for it to pay reasonable and fair operating expenses.

As Mr. Justice Butler said, in Manley v. Georgia, decided by the Supreme Court on February 18, 1929, 73 L. ed. —.

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Bailey v. Alabama, 219 U. S. 219, 233 et seq., 55 L. ed. 191, 198, 31 Sup. Ct. Rep. 145. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Ref. Co. 241 U. S. 79, 86. 60 L. ed. 899, 904, 36 Sup. Ct. Rep. 498."

In Houston v. Southwestern Bell Teleph. Co. 259 U. S. 318, P.U.R. 1922D, 793, the Supreme Court affirmed a decree of a Federal District Court finding a rate ordinance confiscatory. In this case it was contended that the charges made for services rendered and supplies furnished to the operating company by the holding company, namely, the American Telegraph & Telephone Company, and its subsidiary, the Western Electric Company, were presumptively unconscionable, and because the company refused to disclose the profits of the holding company, it had no standing in a Court of Equity to claim that the rate ordinance was confiscatory.

In other words, it was contended that since the American Telegraph & Telephone Company owned all the stock of the operating company, and since the operating company leased its equipment from the American Telegraph & Telephone Company, the company was bound to make a disclosure of the profits of the American Telegraph & Telephone Company, and its subsidiary, the Western

* *Re* Wisconsin Teleph. Co. P.U.R.1927A, 581.

Electric Company, and since it would not make this disclosure it could not be heard in a Court of Equity. In answer to this contention, the Supreme Court said, at page 323:

> "It is true that the company did not introduce proof to show what the profits of the two companies were either upon the business done with it or on their entire business, but it did introduce evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telegraph & Telephone Company controlled the company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the company, but the court recognized and applied the rule."

In Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, P.U.R. 1923C, 193, 200, the Supreme Court reversed an order sustaining a Commission order which disallowed as an item of expense in fixing rates a part of the charges paid by an operating company to a holding company. In this case the expense equalled 4½ per cent of its gross revenues and was paid to the American Telegraph & Telephone Company as rent for equipment. The Court, in holding that this expense item must be recognized in fixing rates, said:

> "Four and one-half per cent is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion requiring business judgment."

Other cases to the same effect are: Southern Bell Teleph. & Teleg. Co. v. Railroad Commission, 5 F. (2d) 77, P.U.R.1926A, 6; Pacific Teleph. & Teleg. Co. v. Whitcomb, 12 F. (2d) 279, P.U.R.1926D, 815; Indiana Bell Teleph. Co. v. Public Service Commission, 300 Fed. 190, P.U.R.1925A, 363; Brooklyn Borough Gas Co. v. Prendergast, 16 F. (2d) 615, P.U.R. 1927A, 200, 224, where the Court said:

> "Defendants do not contend that the plaintiff did not actually incur every item of operating expense as claimed, nor do they suggest that the plaintiff bases its claim upon other than accurate books of account. They did not prove waste or inefficiency, and I see no reason for substituting the hypothetical judgment of the accounting witness for one of the defendants for the actual experience of the plaintiff in the operating of its business."

THE same rule has been recognized by some Public Service Commissions. For instance, in Wood v. Elmira Water, Light & R. Co. P.U.R.1927B, 400, the New York Public Service Commission refused to disregard contracts of the company made with a holding company in considering a complaint against rates, and said at page 414:

> "There is a clear line between regulation of a utility and the management of the detail of its business. Within reason, the company is entitled to pay for the management of the business whatever amount in its judgment is necessary, and the Commission will not attempt to impose its judgment for the judgment of the

"The legislature of one state has no power to investigate, regulate or control the INTRA VIRES *acts of holding companies incorporated in another state, relating to their internal affairs."*

board of directors. If the cost of general administration plus the cost of the contract with the United Gas & Electric Engineering Corporation is not more than a reasonable amount in comparison with the amount paid for general administration expenses by other companies in substantially the same class, the Commission should not interfere with it."

The only criticism one might make of this excellent statement is that under the decisions of the Supreme Court, the Commission not only *should* not interfere with the management contract under the conditions stated, but *could not* interfere with it. It was not an act of discretion, but a lack of power.

It is clear that under the decisions of the Supreme Court, additional legislation is not necessary. The Commissions today have all the power which the legislature could give them, namely, the right to investigate such contracts when they are directly involved in the rates of public utilities, and if the fact is established that charges under them are unfair and unreasonable, and not a proper exercise of management, to disregard them in fixing rates, and to consider in place of them reasonable allowances.

VI.

In investigating the reasonableness of operating expenses, Commissions have not unlimited power "to inquire into the costs and profit accruing to nonutilties," and under the cases we submit that they cannot be given that power.

The fishing expeditions, recommended by advocates of legislation subjecting holding companies to complete investigation by Public Service Commissions, would be an unlawful interference with private business. There are a number of cases in the Supreme Court of the United States showing that that Court looks with disfavor on such investigations.

In Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, the Interstate Commerce Commission was investigating the Union Pacific Railroad, and in connection with the investigation asked Mr. Harriman, an officer of that company, as to his ownership of stock in other railroads. He refused to answer the question, and the Supreme Court held, reversing the Circuit Court, that he could not be compelled to answer the questions. Mr. Justice Holmes, in delivering the opinion of the Court, said at page 418:

> "Whether Congress itself has this unlimited power claimed by the Commission, we also leave on one side. . . . Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in more acute form. It is enough for us to say that we find no attempt to

make such a delegation anywhere in the act."

The Court, answering the contention of the Commission that it had power to discover any facts which would aid in recommending legislation, said at p. 419:

> "We are of opinion on the contrary that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act. . . . In other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."

In United States ex rel. McReynolds v. Louisville & N. R. Co. 236 U. S. 318, P.U.R.1915B, 247, mandamus was brought to compel the defendant to allow the agents of the Interstate Commerce Commission access to its correspondence files. The defendants answered that the correspondence contained private communications which would not in any way pertain to the provisions of the act to regulate commerce, and if the act authorized this it violated the 4th Amendment to the Constitution of the United States.

The Court held that the Commission's power was limited to the inspection of accounts, records, and memorandum, and did not include power to inspect correspondence.

In Federal Trade Commission v. American Tobacco Co. 264 U. S. 298, 68 L. ed. 696, mandamus was brought to require production of records, contracts, etc. It was denied in 283 Fed. 999. The act pursuant to which the Commission was acting directed the Commission to prevent the use of unfair methods of competition and gave to the Commission broad powers of investigation. The Court, in affirming the judgment below, said, at p. 305, through Mr. Justice Holmes:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loathe to believe that Congress intended to authorize one of its subordinate agencies to sweep all traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried. . . . It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."

In view of these cases, legislation conferring unlimited power to investigate the private business of a holding company would raise serious constitutional questions. In the first place, investigation merely for the purpose of recommending legislation, is a legislative function (McGrain v. Daugherty, 273 U. S. 135, 71 L. ed. 580), which cannot be delegated.*

In the second place, such an unlimited power not in aid of any police power of the Commission, would be an unjustifiable interference with liberty or the right to privacy and void under the 14th Amendment.†

Furthermore, the legislature of one state has no power to investigate, regulate or control the internal affairs of

* Harriman *v.* Interstate Commerce Commission, *supra.*

† Williams *v.* Standard Oil Co. 73 L. ed. —, P.U.R.1929A, 450. Both parts of the Statute involved in that case were held unconstitutional.

holding companies incorporated in another state.*

VII.

In conclusion, it is clear that in so far as the business of a holding company consists of furnishing services of a supervisory, engineering, and similar character, it is not subject to regulation by the state, even though in some other aspects of its business it might be a public utility. The state cannot fix directly the price for such services any more than it can fix the price that an engineer or purchasing agent fixes for his services—and this regardless of whether the purchaser be a public utility or not.

The state cannot interfere with the price, even indirectly, when the purchaser is one of the subsidiaries of the company furnishing the service, unless there is actually established as a fact that there was fraud in connection with the contract, or such an abuse of discretion as resulted in an exorbitant charge so as to adversely affect the rates charged for public service over which the state has control.

Furthermore, there is no presumption that because of joint ownership management contracts are fraudulent, nor is the fact of such ownership sufficient evidence of the exorbitance of a charge made by the company.

Furthermore, the business of a holding company is not subject to a general investigation of the character of a fishing expedition by the state, although it can be examined with respect to any particular contract where the reasonableness of that contract affects a particular rate under inquiry. The state cannot order reports in general with respect to such business except in so far as it can order such reports from all corporations subject to its jurisdiction.

On the other hand, if the holding company is organized so clumsily that the business which it conducts cannot be separated from a public utility business, but is intermingled with a public service rendered by such holding company, then its contracts will be subject to indirect regulation by the state. This is an exception to the general rule, and as long as the business is properly organized and fairly conducted, it is free from regulation.

The remedy against exorbitant contracts of public utilities, whether made with a holding company or a subsidiary of a holding company or an independent concern, is ample today without any further legislation. In every rate case, the Commission has a right to limit the rates charged for the public service to such a figure as will be reasonable, and in ascertaining what is reasonable, it can disregard exorbitant operating expenses.

*8 Fletcher Cyc. of Corp. § 5807; Miles *v.* Woodward, 115 Cal. 308, 311, 46 Pac. 1076; Commonwealth Acceptance Corp. *v.* Jordan, 198 Cal. 618, 630, 246 Pac. 796; Guilford *v.* Western U. Teleg. Co. 59 Minn. 332, 61 N. W. 324; *Re* Ostrander, 206 App. Div. 362, 201 N. Y. Supp. 423; Southern Sierras Power Co. *v.* Railroad Commission (Cal.) 271 Pac. 747.

¶ *The changing attitude of "The Man on the Street" toward public utility corporations will be described by one of them in the coming issue of* PUBLIC UTILITIES FORTNIGHTLY—*out June 13th.*

PUBLIC UTILITIES FORTNIGHTLY
MUNSEY BUILDING ✣ WASHINGTON, D. C.

May 30, 1929.

Dear Sir:

As we understand it, resentment is strong displeasure or anger provoked by a wrong or an injury.

An insult is gross abuse offered to another either by word or act; an affront or an indignity.

COMMON RESENTMENTS AND INSULTS. In one of our states certain legislative action was recently proposed. What the aim was does not matter. But one of the legislators received a congratulatory message from a constituent, complimenting him on his vote on the measure. The message ended with these words:

> "We strongly resent attitude and action of opponents in that matter."

In another state a street car company, asking for an increase in fare, purposed to take its case to the courts. One citizen referred to the "threat" of the company to do this as

> "an insult to the citizens who aroused the people to fight the proposed increase."

Here then we have one case in which a difference of opinion is resented, and another in which it is regarded as an insult, which amounts to practically the same thing.

We do not usually resent anything unless we deem it a personal affront, or an affront to our kin or our friends. We really feel insulted. The more our amour propre is involved the more deeply we feel insulted. We will not

put up with an insult if we can help it. We refuse to turn the other cheek.

These artless statements which we have quoted, as to the indignation produced by opposition to proposed legislative action and by the "threat" of court action, may cause you to smile a little; but wait a minute. Are we not all a little bit inclined that way ourselves? Is this not a rather amusing flash of human nature?

Just how much toleration is there in our systems beyond that which is forced upon us by law?

Do we accord others the same freedom of opinion we claim for ourselves?

How often do we brand with hard names those who merely differ from us in their conclusions?

Are we ourselves really good sportsmen when it comes to liberty of thought and action?

Think it over before you smile at those who resent or are insulted by the conduct of others, acting clearly within their rights.

Very truly yours,

Henry C. Spurr

HCS:R

Will Boulder Dam Help or Hurt the Electric Companies?

These three pertinent questions are raised by the recently enacted laws that provide for electric power production in Nevada:

(1): What will be the economic effect of this project upon existing electric utility systems in the lower Colorado river basin?

(2): To what extent will it stimulate Federal regulation of the public utility companies?

(3): Does this law portend an invasion by the Federal government of private ownership and initiative in the electric power field?

In this article these points are considered.

By GERALD M. FRANCIS
PROFESSOR OF ECONOMICS, ROCKFORD COLLEGE

AFTER more than a decade of official investigation, reports and discussion Congress has passed the Boulder Dam flood control bill.

Accompanying this enactment is an authorization of a maximum expenditure from the Federal treasury of $165,000,000 to finance the project. Twenty-five million dollars of this sum constitutes a Federal subsidy to flood relief repayment of which is conditional upon income from power sales. The remainder, with interest at 4 per cent, is to be repaid within a 50-year period from income realized in the sale of water for irrigation and domestic use and of power to be generated at the site of the dam.

The Congressional Act authorizes the Secretary of the Interior to construct, operate, and maintain (1) a dam at Boulder or Black Canyon to store not less than 20,000,000 acre-feet of water, (2) an all-American canal to supply water from the lower Colorado river to the Imperial and Coachella Valleys in California, and (3) the Secretary of the Interior is authorized to construct or cause to be constructed at or near the dam a power plant and incidental structures.

The law further provides that title to the dam, reservoir, and incidental works shall forever remain in the United States Government.

Discussion of Boulder Dam in this article will be restricted to the implications of the first two questions stated in the heading of this article. Whatever may be the future official attitude toward Federal owner-

ship and operation in power production, the present trend in legislative and administrative policies is assuredly unfavorable to any such undertaking.

THE bearing of Boulder Dam construction upon privately-owned public utilities depends to some extent upon the fact of Federal legislation in what seems a local or regional problem. Navigability and interstate character of the Colorado river constitute the chief bases of claim to Federal jurisdiction. Federal intervention in this project flows from these considerations and from inability of interested states to reach an agreement as to water rights in a state scheme of storage and distribution of water for flood control and irrigation diversion.

The Boulder Dam law has, therefore, been so qualified that dam and canal construction by Federal agency may not begin until at least six of the seven river states have made a compact governing the storage of water and its distribution among them. These states will no doubt welcome this opportunity inasmuch as several of them, notably Arizona, have, in opposing Federal construction of the dam pleaded their proprietary authority obtained by state constitutional reservation over diversion of waters of this river.

THE first two objectives stated in the law have been fairly generally accepted as legitimate functions of the Federal Government. Efforts in the interest of flood control on interstate streams fall constitutionally within the legislative powers of Congress. Where state rights exist, as in water diversion, recognition must be given to them. Having in this instance recognized such rights, the Federal Government assumes the role of financier and builder of the dam and irrigation canal. Through these structures stream flow regulation for flood prevention and storage of water for irrigation in California and Arizona are all to be effected.

The third objective named, construction and operation of hydroelectric power units at the dam, is for the purpose of reimbursing the government for costs incurred in construction and also to provide cheap electric power for industrial development. This authorization, however, does not require government ownership and operation of power producing units. The Secretary of the Interior may in his discretion lease a unit or units of a government built plant with right to generate electrical energy, or as an alternative, licenses may be issued for the use of water for generation of electrical energy, the necessary plant and structures to be built by the licensee.

In production of hydroelectric energy at Boulder Dam it probably will not be a matter of importance whether a private or municipal lessee generates energy in a governmentally constructed plant or whether it constructs its own generating units. It may be assumed that in either case units of the most modern, economical design will be installed. It is probable that under present Federal administrative policy, water rights at the dam will be contracted for by existing power companies or by municipalities or both and that they will build their own generating equipment under the terms of the Federal Water Power Act.

IN attempting to answer the first question stated above (as to the effect of the Boulder Dam project upon existing electric utility systems), two economic aspects of power markets must be considered. They are:

First, the cost of power generation per kilowatt-hour at Boulder Dam as compared with similar cost of competing companies in a given market.

Second, the expansibility of the market for power in the area within which it can be transmitted from Boulder Dam.

Fundamental to these factors is the requirement in the law that before any appropriation of funds may be made for construction of the dam there shall be power contracts adequate to return within a fifty-year period the estimated cost with interest at 4 per cent.

CONSIDERED from a long time point of view, cheapness of electric power produced at Boulder Dam will depend largely upon the low cost of water to licensees operating plants. Figures on the cost of producing electric energy at the dam are still in the stage of engineers' estimates. Cost of the dam, irrigation canal, and flood control works may exceed the Congressional appropriation of $165,000,000. The report made to Congress in December, 1928 by its Board of Engineers estimated $176,000,000 as a minimum cost for the structures authorized in the act. Engineering estimates indicate that about 85 per cent of the gross income to the government from the entire project will be derived from sales of water for generation of power.

These two facts of total cost and the importance of power sales as a producer of income will directly affect the pricing of water by Federal agents to buyers for use in power production. Governmental interest both in income return on the whole undertaking and cheap industrial power will lead to prices for water being fixed at a point to effect maximum production and sales of electric power.

On the basis of the above considerations it has been estimated that hydroelectric power at Boulder or Black Canyon can be generated at a cost, including delivery wholesale to any point in Southern California, of about 0.45 cents per kilowatt-hour.

This figure is based upon conditions and costs at a dam of the enormous size authorized in the law. For a dam lower than 550 feet the cost per kilowatt-hour output would be disproportionately higher, because of the rapid rise of fixed charges per kilowatt capacity as smaller structures are employed. Likewise if construction costs should become excessive through inefficient management, the total cost of power would be materially higher. The goals of income return and cheap power would then be missed by lowering the amount of power salable in competition with other sources.

THAT the figure quoted above is representative of large scale hydroelectric generating units is known to all who are familiar with costs in such plants. At this cost power produced at the dam and transmitted to any point in Southern California and Southwestern Arizona would probably compete successfully with most steam generated electricity in the area. This, however, need not work to the

The Power Companies May Benefit—If.

"IT seems logical to conclude, relative to the effects of low cost of power production at the dam, that existing power companies and municipal distribution systems in this whole area will constitute the greater number of purchasers of power for retail distribution; that it will be to the interest of these companies in many cases to substitute Boulder Dam power from units installed by themselves for their own higher cost power, whether steam or hydroelectric; and that in so doing the companies will lose nothing in the substitution so long as they are permitted to charge a rate based upon cost of delivering Boulder Dam power plus their fixed charges on equipment held in reserve for emergency use."

disadvantage of utilities engaged in power production and distribution. Where the price of Colorado river power per kilowatt-hour delivered wholesale is equal to or less than a power company's operating expenditures, the company could afford to maintain its steam plant as standby equipment. Although its fixed charges would run on, there would be no loss and there might be a gain if present operating expenses are in excess of cost of Boulder Dam power delivered to its distributing system. Such substitution would, moreover, effect enormous economies in oil or coal consumed in present steam generating units.

When the cost of Boulder Dam power delivered to consuming areas is being considered, comparison should also be made with costs of competing hydroelectric systems in California.

Public utility companies and the city of Los Angeles maintain such systems. The municipal system of Los Angeles must annually be supplemented with additional amounts of energy due to increasing demand. This energy is now being purchased from the Southern California Edison Company's hydro-electric plants. Congressional attitude as developed by debate of the Boulder Dam Bill seemed to be that the city of Los Angeles would be one important licensee of the Federal Government for generating power to be transmitted to the metropolitan area of that city. This development is very likely to occur. On the basis of present rates it is considered unlikely that public utility companies could continue to provide hydroelectric energy from their smaller installations in California to Los Angeles at as low a rate as the city could provide by generating and transmitting energy under its own Bureau of Power and Light from Boulder Dam two hundred fifty miles distant. In doing this, Los Angeles will be substituting power from the Colorado river for present water power resources in California. In this respect lower cost of power developed at Boulder Dam may cut into some of the demand now made upon public utilities. Such a statement cannot be made positively because of uncertainty as to the growth of demand for power in this whole region.

PRIVATE power companies generating hydroelectric energy at a distance from Boulder Dam may or may

not be affected in the same manner as will Los Angeles. If their installations are large in capacity so as to give them costs close to those they would incur in leasing water and generating energy at the dam, there would be little advantage in substituting Boulder Dam energy for that of their existing plants. If, however, their own load factors were already at a maximum and their demand increasing, such companies would find it profitable to seek cheap power from large installations made by their own engineers at Boulder Dam. In conceivable cases, as where hydroelectric stations have appreciably higher costs than would be met in generating power at Boulder Dam, it might even be economical for their capacity to be held in reserve and energy from Boulder Dam to be substituted.

It seems logical to conclude, relative to the effects of low cost of power production at the dam, that existing power companies and municipal distribution systems in this whole area will constitute the greater number of purchasers of power for retail distribution; that it will be to the interest of these companies in many cases to substitute Boulder Dam power from units installed by themselves for their own higher cost power whether steam or hydroelectric; and that in so doing the companies will lose nothing in the substitution so long as they are permitted to charge a rate based upon cost of delivering Boulder Dam power plus their fixed charges on equipment held in reserve for emergency use. What official attitude might be taken toward this practice will be briefly considered later in this article.

THE matter of costs of producing power at Boulder Dam in comparison with costs at present power sites cannot be considered entirely separate from the problem of probable markets for Boulder Dam power. Importance of costs of producing power at various sites is not so great as is often stated when there is considered the rapid growth of demand for power in the lower Colorado river basin over a decade. If, as the present writer believes, new demand for low-priced power from Boulder Dam will rapidly develop to meet the full capacity of equipment installed from time to time, any harmful effects of such cheap power production upon public utility companies will tend to be negligible. Those companies will in many instances contract for power sites at Boulder Dam, as explained above, and will then become leaders in the development of a cheap power market in this whole area.

Exactly how long a time will be required for growth of new demand sufficient to employ 600,000 kilowatt capacity at the dam cannot be stated at the present time. Power engineers who have studied this question estimate three to four years as the period required for complete absorption of the power. Recognizing the fact that construction of the dam at Boulder or Black Canyon will require seven to ten years, it is very likely that in anticipation of cheap power that will eventually be available, industrial growth in this whole region will be stimulated to a rate which will create a demand for power as rapidly as it is made available. This would appear to be a reasonable outlook.

"Power development at Boulder Dam will not affect adversely but, on the contrary, will widen the activity of electric utility companies in this area."

RAPIDITY of economic growth in Southern California and Arizona during the past two decades is well known. Population increases here have caused a rapid industrialization that is still progressing. A metropolitan character has been acquired and is being intensified. As a consequence, movement of Colorado river water for irrigation and urban use is expected to require large amounts of electric energy. Added to this is the fact that the dominant agricultural production in the region uses the whole country as its market. Hundreds of thousands of acres of rich land in the two states will be opened to cultivation by completion of Boulder Dam. This present and potential growth offers an assurance of power markets that will leave present sources of electric energy substantially unaffected by competition with power generated at the dam except in the temporary ways above stated.* With the law so phrased as to permit governmental leasing of water for private generation of electricity in privately constructed power units public utility companies are by reason of their experience and efficiency in power production especially fitted to become Federal licensees at Boulder Dam. Such companies will do themselves a service as well as promote industrial growth if they will make the most of cheap power production at Boulder Dam and develop the widest possible market for it.

THE second question raised early in this discussion involves the issue of state *versus* Federal supervision of public utilities which may becomes licensees at Boulder Dam.

The question involved is, Will a precedent be established for Federal regulation of public utilities by the entry of such companies as licensees of the Federal Government in power production at the dam?

On this subject the law is clear and needs merely to be stated.

Under terms of the Federal Water Power Act of 1920, whenever a Federal license is granted to a company for power development on a navigable stream, the Federal Power Commission has authority over such project as to security issues, service, rates on energy, capitalization and accounting methods. In case the power enters solely into intrastate commerce § 19 of the act authorizes a compulsory suspension of Federal regulatory au-

* Detailed facts as to past and probable future growth of population and industry in Southern California are presented in the Report to the Federal Power Commission on the Water Powers of California, 1928, made by the Engineers of the United States Forest Service. This volume shows in detail that growth of demand for power in Southern California as compared with the remainder of the state and of the United States has been extraordinary; after analyzing water power resources in California, developed and undeveloped, the report states in reference to Colorado river power, p. 169, "Most of the vast quantity of electric energy will probably be consumed in the California market."

thority provided the state concerned maintains a regulatory authority with powers as wide as those of the Federal Commission.

Concerning this point the Federal Power Commission in its 1928 anual report states:

> "In § 19 of the Act Congress made provision for regulation by the Federal Power Commission of intrastate operations of its licensees in cases where the state had not empowered a Commission or other agency of its own to regulate such matters; but it was provided that the authority thus given to the Federal Power Commission should cease as to any specific matter as soon as the state had provided its own agencies of regulation. Section 19 further provides that every licensee shall agree, 'as a condition of the license,' to the exercise of regulatory control by the Commission in such cases; that is, the authority to exercise such control in intrastate matters is derived wholly from the contract relation existing between the United States and its licensees. Under the limitations of § 19, no regulation that may be so exercised will overlap or encroach upon the jurisdiction of the state, for if and when the state assumes jurisdiction over any matter the exercise of control by the Federal Power Commission *ipso facto* terminates."

INASMUCH as Arizona and California maintain public service commissions that have powers over service, rates, security issues, accounts, and capitalization fully equivalent to those exercised by the Federal Power Commission, it is likely that all licensee public utility companies selling energy from Boulder Dam solely into intrastate commerce would be subject to regulation by a state authority.

Nevada provides a Public Service Commission with regulatory authority over all these subjects except capitalization and security issues. Since one of the principal objects of Federal regulation is to control net investment, it is not probable that Federal licensees would be eligible to regulation by such a State Commission.

Companies which are licensees at Boulder Dam will, however, sell and transmit much energy across state lines. This constitutes interstate commerce and apparently would subject such business to Federal regulation. Section 20 of the Federal Water Power Act provides in respect to Federal licensees transmitting electric energy into interstate commerce that Federal Commission powers of regulation shall be limited to those cases where some one "of the states directly concerned has not provided a Commission or other authority to enforce the requirements of this section within such state . . . or such states are unable to agree through their properly constituted authorities."

This provision of the law so far as it concerns interstate commerce in electric energy, has been nullified by decisions of the United States Supreme Court. The Court has said that all interstate transmission of energy by Federal licensees of a purely wholesale character (that is, interstate transfer the carrier of which sells to another public utility company and not into local consumption), is purely interstate commerce and is not subject to state control but to the control of the licensing authority, which in this case is the Federal Power Commission.

WHERE an interstate transfer of energy continues into local consumption through the distributing system of the original interstate carrier, the Supreme Court has held that a degree of local character attaches to such commerce sufficient to permit state regulation, provided authority has been given, so long as Federal authority chooses not to act. In such cases § 20 of the Federal Water Power Act, providing for State Commission regulation, would be operative. This issue of state *versus* Federal control of interstate commerce in electric energy by Federal licensees is thus summarized in the 1928 annual report of the Federal Power Commission:

> "Since under the decisions of the Supreme Court the states may not confer upon their Commissions authority to enforce the requirements of § 20 over wholesale interstate transactions in electric energy, and since they could not make valid joint agreements about matters over which they had no individual authority, the Federal Power Commission appears to have exclusive regulatory jurisdiction over such wholesale transactions of its licensees. But where, on the other hand, regulation has to do with local services or with rates for energy brought into a state by a licensee who sells and delivers it there, the Federal Power Commission has jurisdiction only where there is no State Commission, or where the State Commission has no authority over the particular matter which requires regulation."

OBVIOUSLY there will be both kinds of interstate transfers of energy from Boulder Dam. Those purely wholesale in character between transmission and distributing companies will clearly fall under Federal Power Commission regulation. In so technical a field of power production and distribution, however, it is only logical to expect that a majority of licensees will be public utility companies interested in securing energy for their distribution areas. This has been true of water power developments already operating in California.

These utility companies as licensees will, according to present Federal law and court decisions, be subject to State Commission regulation in Arizona and California in respect to all those subjects over which the Federal Power Commission ordinarily has jurisdiction.

The Public Service Commission law in Nevada will need only slight changes to enable the Commission of that state to exercise full jurisdiction over capitalization and security issues as it now does over rates, services, accounting, and valuation.

These three states will be the only ones that use important amounts of power from Boulder Dam. In respect to the regulatory issue, therefore, it seems certain that production and transmission of electric energy at Boulder Dam by electric public utilities will not in most instances place them under Federal control.

FINALLY there remains to be considered the issue of rate making raised earlier; that is, the probable regulatory attitude toward basing rates to the public on Boulder Dam power which is substituted for power from other sources upon delivered cost of that power plus fixed charges on generating capacity held in reserve.

It should be clear from previous discussions that this issue will arise

only where a public service company can make such substitution with no increase in its total costs and, therefore, in its existing rates. As pointed out earlier, it may in such cases be possible for substituted power to be sold at a lower rate than that upon existing power sales because delivered cost of Boulder Dam power is lower than operating costs at the displaced plant. If the public utility is transmitting power to its own distributing system from its own installation at Boulder Dam, the rate regulation problem will fall under state jurisdiction, regardless of whether or not its energy goes into interstate commerce.

State Commission rate regulation has developed the principle that where energy from a cheaper source is substituted for customary sources, the new rate may include fixed charges necessary to maintain the generating capacity held in reserve for emergency breakdown of distant plants or transmission equipment, but such new rate must not be in excess of the old.

This principle is widely applied in California, where hydroelectric energy is substituted for steam generating capacity held in reserve for emergency. In many Commission decisions orders have been given that any economy effected by substituting such lower cost energy shall in part be passed on to the consuming public. It may logically be expected that State Commissions will apply this principle of rate regulation to cases of energy substitution from Boulder Dam. Too much importance need not be attached to this form of rate making if recognition is given, as has been done earlier in this article, to the importance of new demand for electric energy that will develop during the decade or more in which Boulder Dam power resources are being made available. Growth of such demand in response to availability of cheap power will eliminate the substitution process and reduce the rate-making problem to one of accounting for specific costs in producing and delivering power.

THE above facts constitute sufficient reasons for believing that power development at Boulder Dam will not affect adversely but, on the contrary, will widen the activity of electric utility companies in this area.

Low priced power will result from the project up to a maximum installation of about 1,000,000 kilowatt capacity. Approximately a decade will be required to see this achieved. Meanwhile all evidence of urban and industrial growth supports the conclusion that power markets will gradually absorb substantial portions of energy as produced at the dam.

Doubtless some maladjustment of demand and supply will occur over a considerable period, as is usual in the working out of economic forces of such magnitude. The opportunity of electric public utility companies in relation to Boulder Dam lies in the wise and efficient employment of these power resources in the service of industry, cities and homes.

Power production on the Colorado river presents a challenge to operating electric utilities to be of public service in their own technical fields of electric generation and market distribution. On the basis of their past achievements it may be expected that they will contribute much to the success of the Boulder Dam project.

Three Reasons Why Conventions Are Important

THE longer an individual is associated with one business enterprise, the more valuable he is likely to be. Unfortunately, when a man stays a long time in one job, in one company, in one city, the job is apt to run itself. It is necessary, therefore, that the individual, for his own good and for the good of his company, should keep himself modernized and learn the best business practices and the latest improvements.

One of the reasons for the existence of a trade association is to enable its members to keep themselves informed of the latest improvements and best methods developed in their own particular industry. It is advantageous and desirable that they should have the opportunity of meeting other men who are engaged in the same industry. A convention affords this opportunity.

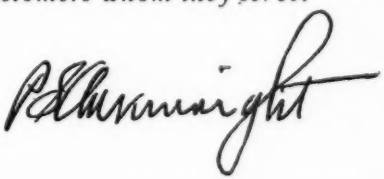
There are three outstanding advantages of a convention:

FIRST, *is the opportunity for making and renewing the personal contacts with the various members of the industry; these contacts necessarily lead to the exchange of experiences and useful information:*

SECOND, *is the opportunity to inspect new exhibits:*

THIRD, *is the practical importance of the meetings and of the actions that they take; the papers that are read are always instructive, and often significant.*

Conventions are well worth the time and expense in the benefits they confer on the individuals, on the companies they represent, on the industry of which they are a part and on the customers whom they serve.



Preventable Complaints from Ratepayers

Seven of the most common reasons why the public calls upon the State Commissions for relief from public utility corporations—as seen by an official who handles the protests.

By EARLE H. MORRIS
CHIEF ENGINEER, BOARD OF RAILROAD COMMISSIONERS OF NORTH DAKOTA

PUBLIC service corporations, in those states where regulation of their activities has been initiated, are in effect monopolistic in their activities. As such, they have a legal obligation to their patrons as well as a great and mounting moral obligation.

The legal obligation of a utility corporation to the public is fairly well defined. But unfortunately some corporations are trying to transfer parts of their moral obligation so as to make them appear as a legal obligation. This attitude tends to raise up a spirit of indifference or even antagonism among certain types of employees towards the public they are serving, and this attitude reacts upon their employer.

"Service," as we of the regulatory bodies see it, is an act of supplying some general demand, whether it be gas, electric energy or steam heating, at reasonable rates and in such manner as to satisfy the consumer and to encourage his increasing use of the service.

Suppose we start out at the beginning and analyze what a prospective consumer of utility service is entitled to expect.

I. LACK OF COURTESY BREEDS MISUNDERSTANDINGS

SUPREME above everything the ratepayer expects courtesy. Without courtesy the first contact has the sharp edge of its effectiveness dulled at once. Courtesy involves consideration, the twin of courtesy, without which the utility is unable to absorb the problems of the prospective consumer; lack of consideration often leads to misunderstanding. It also involves a spirit of friendliness—an attitude on the part of the utility to study the ratepayer's particular problem, and show him the rates available and explain just what may be expected in the way of results in the way of monthly bills. It involves speed without bluster in the handling of the ratepayers' application for service. It involves constant vigilance in seeing that the commodity served is of con-

stant quality and is correctly regulated, and that his appliances may work at their highest efficiency in accordance with their rating.

An adherence to these principles would save reams of paper that are now assigned to printed speeches on public relations—speeches that would not be necessary if unfailing courtesy were the unvarying rule, for then the germ of complaints would have no breeding ground and the regulatory Commissions would have very little to do.

Unfortunately, human nature being as it is, bridge parties still run until late at night, dances go on till past midnight, and the radio programs keep one up late. At the office the next morning it is the prospective consumer who catches the brunt of the irritation; an arbitrary ruling on service connections by a public utility employee brings a scathing letter to the regulatory Commission. This form of trouble is absolutely preventable; it is one example only of a large number of complaints.

2. DELAYS IN THE INSTALLATION OF SERVICE

THEN there are the slow spots in the routine of installing or reconnecting service. The prospective consumer comes home at night and finds that the utility company's promise to him has not been fulfilled, and that his home is still without service. Perhaps the delay runs over to the evening of the next day without any explanation, as the Commission's records indicate. Are the companies surprised to get a wire from the regulatory Commission, asking why?

The telephone company executive smiles a bit at the trouble of the electric and gas men, but we still get complaints from the consumers of their service on the arbitrary rulings regarding connections and reconnections, and also, how about that phone call three days ago at three o'clock stating that the phone at a certain number was evidently out of order? Why was not your trouble man right out "riding" that trouble that evening or at least next morning at the latest? Why wait two or three days, to clear the trouble? This complaint is absolutely preventable, yet every regulatory Commission gets them regularly.

3. COMPLAINTS THAT ARE HANDLED TOO CASUALLY

AND how many times has that stock complaint been raised about "inaccurate meters" and "meter creeping?" Is the consumer altogether in the wrong when, in the handling of that complaint, he thinks the company is trying to put something over on him and complains to his regulatory Board? Delays in handling such complaints are absolutely preventable. Why not act promptly and make that complainant a friend of the company? It can be done.

4. INCORRECT BILLING IS A SOURCE OF TROUBLE

INCORRECT billing is a fruitful source of complaint to Commissions. That type of complaint should never come to the Commission. Where is the contract man? Wherein did he fall down when he contracted to furnish service? Were rates quoted correctly and explained in de-

tail? Was it the bookkeeping department that slipped? Why was not the whole matter settled on the spot when the "howl" first originated? It is pure childishness to let a complaint of this nature reach the regulatory body, and the fact that it does indicates that there is something wrong in administration somewhere.

5. LACK OF UNIFORMITY IN COMPANY RULINGS

ANOTHER place where friction is even now starting a flood of preventable complaints is in the lack of uniformity of thought and action between electric utilities in regard to rules that govern the placing of appliances upon their lines. Should the electric refrigerator take a power, cooking or heat, or general lighting rate? Or should it have a rate schedule all its own? This problem is reaching some proportions, as some of the companies insist the refrigerator is a power appliance while others, operating in adjacent territory, insist that it rates the same consideration as a stove; yet others state that the refrigerator does not rate anything different than a washing machine, and consequently goes on the lighting schedule. Why cannot there be uniformity of policy among the utilities?

6. LACK OF DIPLOMACY WHEN DISCONTINUING SERVICE

HOW many times has a utility executive faced the problem of ordering a discontinuance of service to one of his patrons? Does that executive always keep in mind the monopolistic character of the service he is rendering? Does he review the decisions of the courts and is he conversant with the rules of his regulatory body before he makes his own decision? Does he show diplomatic ability in his contact with the consumer whose service is to be disconnected (or actually is disconnected), so that that patron of his service realizes that he is in the wrong?

Too many times, as the record of Commissions indicate, the patron wires the Commission for relief.

Complaints have in the past reached every Commission, from both parties concerned, in alleged cases of theft of energy. We have adequate laws governing such cases, and Commissions have encouraged the utilities to use a "mailed fist" in handling them. When theft is proved, the Commissions have been glad to back up the utility in enforcing a rule regarding locked safety-entrance switch boxes, and complaints have ceased.

7. TOO RIGID OBSERVANCE OF MINOR RULES

RULES are convenient excuses to fall back upon. If they are fairly drawn, they are instructive to the contact man as evidence of his employer's ideas as to the conduct of his particular job.

Are these rules too rigid? If they are, they should be revised at once; a rigid adherence to rules that relate to minimum wattage installation of appliances, in order to secure a heating or cooking rate, has caused Commissions an endless number of complaints. Worst of all is the attitude of certain types of subordinates in evading responsibility for company

rules by trying to shift that responsibility to the regulatory body.

Does a letter or telegram from a disgruntled customer to the Commission help the utility? Complaints of this type are many—and preventable.

THE ratepayer or consumer of service is a long-suffering creature. He will put up for months with a voltage variation that shortens the life of his lamps even though that variation or fluctuation continues daily. He will stand for short outages without more than a perfunctory kick, locally made. He will stand for rate adjustments if they are legally made. He will pay what he considers a high rate as long as he feels that there is an interest in himself and his problems on the part of the utility company. But woe betide the company that lets discourtesy, inconsideration, unfriendliness, or slowness show in their contacts with him!

The "high hat," impersonal attitude that is being engendered in the contact between the server and those served, caused by the rapid expansion of the holding company idea, is at the bottom of a large number of preventable complaints to the Commissions. And it presents a problem to utility management that is a challenge.

Facts Worth Noting:

¶ In all of Great Britain only 1,770 farms had electric service a year ago while in the United States 248,000 farms were thus served.

¶ America's natural gas industry today serves 2,516 cities and towns in 22 states.

¶ An "anti-necking lamp" law in Japan requires that all autos be fitted with a dome light which must be illuminated when driving at night.

¶ The Equitable Building at 120 Broadway, New York, has more telephones than there are in all of Greece.

¶ London issues an Imperial Airways time table, covering a regular weekly 5,000-mile passenger and freight service from London to India.

¶ There are twenty-three million electric customers and fifteen million gas consumers in the United States.

¶ The sale of gas, manufactured and natural, in the state of California, is in excess of the total for Continental Europe and is nearly 80 per cent that of England and Wales.

¶ It requires approximately 100,000,000 miles of telephone wire to operate the world's telephones. Of this wire mileage, approximately 68,000,000 are located in North America.

¶ During 1928 approximately 600,000 dial telephones were placed in operation, making a total at the end of the year of 3,500,000, or about 18 per cent of the total telephones in use in the United States.

¶ One does not use the long-distance telephone in France (where telephone and telegraph service is conducted by the government), without paying in advance. There is no such thing as adding it to the monthly bill.

¶ Electric current meters report their own readings over ordinary telephone wires through a new device called the "telemeter." It has already been successfully installed in the substations of a great electric power concern.

Remarkable Remarks

GEORGE ROTHWELL BROWN
Columnist

"British, French, Norwegian, Dutch, German, Italian, and Spanish ship owners don't care how soon Congress makes the Leviathan dry again."

GEORGE W. NORRIS
U. S. Senator from Nebraska

"I don't see why public utility corporations should be allowed broadcasting privileges."

CHARLES F. STUART
Chairman, Rural Service Committee, National Electric Light Association

"I believe that within five years more than 1,000,000 farms will be enjoying benefits of electricity."

T. O. KENNEDY
of the Ohio Public Service Company

"The saturation point of electric customers is upon us and, furthermore, one-third of our customers are being served at an actual loss on the rate schedules ordinarily in effect."

Plaint of an electrical engineer's young son

"Daddy, I picked up a little bug, and one end wasn't insulated."

JULIUS ROSENWALD
President, Sears, Roebuck & Co.

"Entirely too much stress is put on the making of money. That does not require brains. Some of the biggest fools I know are the wealthiest."

A. R. GRAUSTEIN
President, International Paper & Power Co. (in testifying before the Federal Trade Commission)

"We think it would be the most foolish thing we could try to do would be to influence those papers (in which stock was recently acquired) in any way in their news or editorial policies. . . . And we keep our hands absolutely 100 per cent clear of it. It would not help our power interests if we laid ourselves open to any justifiable suspicion of influencing any one of these papers. Still less would it help the papers."

GEORGE W. NORRIS
U. S. Senator from Nebraska

"These disclosures (that the International Paper & Power Company owns stock in several newspapers) constitute another startling piece of evidence mightly important within itself, but still more important when we remember that it is only one gigantic step of the power interests to get control of the schools, churches, civic organizations, legislative bodies, the press and broadcasting systems. It is a gigantic scheme which startles the imagination. It is another disclosure of the progress made in gaining control of every means of communication that sways society."

JAMES J. HILL
Late railroad magnate

"There are no pockets in shrouds."

GEORGE B. PARKER
Editor-in-chief, Scripps-Howard newspapers

"The one thing and the only thing that a public utility is entitled to is a statement of its side of the case properly labeled as such."

PRESTON S. ARKWRIGHT
President, National Electric Light Association

"Each dollar paid in salary and wages in the operation of an electric light and power company leads to the payment of forty-one additional dollars in salaries and wages to the workers in the enterprises dependent upon it."

An unsigned correspondent to the "Washington (D. C.) Herald"

"An editor owned by a power or paper trust isn't much of an editor, and his papers won't amount to much in the long run."

E. A. ROEHRY
General Manager, St. Louis Electric Terminal Railway Company

"Street cars can and will supply mass transportation in thickly settled sections at a cheaper rate than motor busses, and in my opinion, will be able to do so for a long time to come."

F. A. NEWTON
of Hodenpyl, Hardy & Co., Jackson, Mich.

"I have no patience with the idea that simplicity is the first and most important element of a rate structure. Flexibility and adaptability to costs and changing conditions is, in my opinion of much greater importance."

From the 11th Annual Report of the Public Ownership League of America

"There is not a state in the Union that the league has not entered. It has been represented in hearings before state legislatures, and has prepared literature and press service and has campaigned for weeks at a stretch in state-wide campaigns for public power measures. Two radio stations are broadcasting the league's messages every week."

EDWARD N. HURLEY
Former Chairman, United States Shipping Board

"Privately operated American ships will be materially benefited by this step (to apply the Volstead act to American ships on the same basis as to foreign ships) in competing for their share of the passenger business in the North Atlantic trade."

H. H. AGEE
Rate engineer, Public Service, Electric and Gas Company

"Records covering 257 cities in the United States, each with a population of 25,000 or more, show that 48 per cent of the families provided for in the new residential buildings erected in 1927, were housed in multi-family dwellings, as compared with 24 per cent in 1921 and that only 38 per cent of the families provided for in 1927 were housed in single-family dwellings as compared with 58 per cent in 1921."

WHAT READERS ASK

Out of the mail bag of the Editor have come these questions; because they touch upon subjects of broad interest to those in the public utilities field, they have been selected for publication—together with the answers. What questions do *you* want to ask?

QUESTION

When did the term "public utility" first come into use?

ANSWER

The word "utility" first came into the English language in 1058 A. D. The term "practical utility" was first used in printed form in 1800. The term "public utility" is said to have first come into use about 1906; it appeared in a book in 1908 when it was employed by the well-known author Stewart Edward White. The term "public utility" crept into the regulatory laws about 1911. It was used in the index in the second volume of the reports of the Wisconsin Railroad Commission containing the reports of decisions from September 14, 1907 to October 12, 1908. There is a heading "Public Utilities Law" under which is the line: ("See Convenience and Necessity Law, Various Public Utilities.") But public utility companies are in the main referred to as "public service companies."

QUESTION

How many kinds of public utilities are there?

ANSWER

Considering public utilities in the broad sense as all service companies whose rates are subject to regulation by the state, they have been defined in various state laws to include: automobile transportation companies, dock and wharfage companies, electric light and power companies, express companies, ferry companies, freight line companies, natural and artificial gas companies, heat companies, messenger companies, passenger terminal and union depot companies, pipe line companies for the conveyance of oil, gas, or other liquids, railroads—steam and electric, including interurban and street railways, refrigeration companies, sewerage companies, sleeping or parlor car companies, steamship and steamboat companies, telephone companies, toll bridge and toll road companies, warehouse companies and water companies, including irrigation companies.

Transportation of property or freight has been defined to include any service in connection with the receiving, delivering, elevation, transfer-in-transit, proper ventilation, refrigeration, storage, and handling of the property or freight transported including switching.

As time goes on we may find that there are companies engaged in other kinds of business whose rates are subject to regulation on the ground that they are public utilities. The question, for example, has been raised whether radio broadcasting is public utility service but this question has not been decided.

QUESTION

Were newspapers ever regarded as public utilities?

ANSWER

No. Newspaper service is probably as valuable to the people as several other kinds of service which have been declared to be public utility services, but no attempt has been made to regulate charges for newspapers; and the probability is that their charges could not be regulated on the theory that newspapers are public utilities.

QUESTION

What is meant by the term "public convenience and necessity?"

ANSWER

Public service companies are authorized to allow the construction or extension of public

utilities or public utility service when public convenience and necessity require it.

The question of what the term "public convenience and necessity" means has come up a good many times. It has usually been held that strict necessity for the service need not be shown; that if a real actual necessity were required the word "convenience" coupled with the word "necessity" in the statute would be superfluous, because whatever is necessary to the public is also convenient for its use. On the other hand a convenience to the public may not be a necessity. All that an applicant is required to show is that reasonable convenience and necessity be afforded through the establishment of the proposed service. The use of the word "public" indicates that convenience or necessity must concern the public as distinct from the individual or from any number of individuals. For example, the fact that a proposed motor bus line would be an accommodation to a number of individuals would not necessarily indicate that the establishment of such a service was required by public convenience and necessity. If the proposed bus lines paralleled a railroad line, it might so affect the railroad service as to inconvenience many of the public for the convenience and advantage of a few. The rule as to public convenience and necessity is a flexible one and allows considerable room for the discretion of the Commission in passing upon the question.

Question

How is the revenue for a long distance telephone communication divided between the local telephone company over whose lines the message originates and the toll or long distance company over whose lines the message is completed?

Answer

There are two theories as to the proper division of this revenue between the two companies. One is known as the "switchboard-to-switchboard" theory, and the other as the "station-to-station" theory.

Under the switchboard-to-switchboard theory the local exchange is entitled to be reimbursed from the long distance company only for the expense the local exchange has incurred at the switchboard on account of the long distance or toll business. Under this theory all long distance or toll expense that the local company has from the back of the switchboard to the subscriber's premises is considered as local exchange expense.

Under the station-to-station theory the local exchange would be reimbursed by the long distance company for the toll work done and facilities furnished clear up to the subscriber's station or house. The decisions are not in harmony as to which is the more equitable basis of apportioning the revenue from long distance telephone service.

Question

What is meant by "pyramiding utility securities?"

Answer

Probably the easiest way to answer this question is to give an example:

If Holding Company No. 1 controls in excess of 50 per cent of the voting stock of an operating utility having (say, a total investment of $100,000), then Holding Company No. 1 can control the utility's policies with an investment of a little over $50,000. Likewise if Holding Company No. 2 controls over 50 per cent of Holding Company No. 1's stock and if Holding Company No. 3 controls over 50 per cent of Holding Company No. 2's stock, it will be seen that Holding Company No. 3, sitting on the top of the pyramid, can with an investment of a little over $12,500 direct the destinies of the bottom layer of the pyramid or the $100,000 operating utility through the tapering control of the intermediate holding companies.

This, of course, is a very simple hypothetical example with round figures. As a matter of fact, over 50 per cent is rarely needed to exercise corporate control.

"And on top of this," says Professor William Z. Ripley of Harvard, "the differentiation of securities comes into play to accentuate the process. If, as in most utility companies, senior reliance is on bonds or preferred shares, the bonds never vote and the preferred shares quite often cannot."

Professor Ripley, commenting on this subject in his book, "Main Street and Wall Street," points out that these pyramids can be of two kinds: first; the pyramid of securities resulting in the concentration of corporate control, (which is the example just given) and secondly; the pyramid dealing only with junior securities (that is to say, securities other than bonds or preferred shares guaranteeing a fixed dividend). This second pyramid he says magnifies and concentrates any change, up or down, in the corporate revenue upon the junior securities and makes a comparatively thin equity in the tip-top holding company supersensitive to any fluctuation in the earnings of the operating subsidiary at the bottom of the pyramid.

We are simply giving the point of view of those who view what is called pyramiding of securities with apprehension. We express no opinion as to its soundness.

QUESTION

When a penalty for nonprompt payment has been made a part of the rate schedule and the penalty charge is remitted, does the failure to collect constitute a discriminatory act?

ANSWER

Failure to collect the penalty in such a case would undoubtedly constitute an unlawful discriminatory act. The rule is well settled that deviation from rate schedules is an unlawful form of discrimination. *Re* Capital Water Co. (Idaho) P.U.R.1924D, 292; *Re* Public Franchise League, 24 Ann. Rep. Mass. G. & E. L. C. 20, (anno.) P.U.R. 1915E, 689; Bean *v.* Belgrade Power Co. (Me.) P.U.R.1919B, 977; Remund *v.* Dakota Central Teleph. Co. (S. D.) P.U.R.1916A, 364; *Re* Milne (Utah) P.U.R.1927D, 87; *Re* Ripon United Teleph. Co. (Wis.) P.U.R. 1924A, 171. Failure to collect the penalty would also undoubtedly be regarded as a form of rebate and rebates are made unlawful under modern public utility statutes. *Re* Transportation Cos. (Cal.) P.U.R.1918B, 297; Skogmo *v.* River Falls (Wis.) P.U.R. 1917E, 964.

QUESTION

If a consumer refuses to pay the penalty for nonprompt payment, can service be discontinued?

ANSWER

A public utility company has the right to discontinue service for the nonpayment of its bills. The general rule is that a public utility company has the right to refuse to serve a customer who, after a reasonable opportunity, has failed, neglected or refused to pay for the service already rendered to him. Macon Gas Light & Water Co. *v.* Freeman, 4 Ga. App. 463, 61 S. E. 884; Rushville Co-op. Teleph. Co. *v.* Irvin, 27 Ind. App. 62, 59 N. E. 327, reversing 161 Ind. 524, 69 N. E. 258; Gary Heat, Light & Water Co. *v.* Christ (Ind.) P.U.R.1921C, 355; Shiras *v.* Ewing, 48 Kan. 170, 29 Pac. 320; Cox *v.* Cynthiana, 123 Ky. 363, 96 S. W. 456; Wood *v.* Auburn, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; McDaniel *v.* Springfield Waterworks Co. 48 Mo. App. 273; Vanderberg v. Kansas City-Missouri Gas Co. 126 Mo. App. 600, 105 S. W. 17; State ex rel. Milsted *v.* Butte City Water Co. 18 Mont. 199, 44 Pac. 966, 32 L.R.A. 697, 56 Am. St. Rep. 574; Bradley Beach *v.* Monmouth County Water Co. (N. J.) P.U.R.1917C, 602; People ex rel. Kennedy *v.* Manhattan Gas Light Co. 45 Barb. (N. Y.) 136; Woodley *v.* Carolina Teleph. & Teleg. Co. 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; Kathryn Teleph. Co. *v.* Strinden (N. D.) P.U.R.1926D, 729; Mansfield *v.* Humphreys Mfg. Co. 82 Ohio St. 216, 31 L.R.A.(N.S.) 301, 92 N. E. 233, 19 Ann. Cas. 842; *Re* Pawhuska Oil & Gas Co. (Okla.) P.U.R.1917D, 947; Jordon *v.* Peoples Teleph. & Teleg. Co. (S. D.) P.U.R. 1919C, 226; Vaught *v.* East Tennessee Teleph. Co. 123 Tenn. 318, 130 S. W. 1050, 31 L.R.A. (N.S.) 315, Ann. Cas. 1912C, 132.

The right to discontinue service is usually exercised under a rule properly filed with the Commission providing for it. Rules of this sort have often been approved and their enforcement permitted; but even in the absence of a rule, a utility company would not be required to continue rendering service to people who refuse to pay their bills. The case, however, would be different if there were a reasonable dispute as to the propriety of the bill. But a refusal to pay a penalty provided in a rate schedule filed and approved with the Commission would not be regarded as a reasonable dispute.

QUESTION

What is the provision of the Federal Transportation Act, with reference to the return allowed railroads, and the recapture of surplus by the government?

ANSWER

The provision of the Federal act is as follows:

"If, under the provisions of this section, any carrier receives for any year a net railroad operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described." Interstate Commerce Act," § 15 a, (6). Vol. 44 U. S. Stat. at Large.

How High Must a Rate Be to Be Classed as "Extortionate"?

By DAVID LAY

THE newspaper boys like to stigmatize utility rates as "exorbitant" if not downright "extortionate." This is the way the public feels about it too. So it is with most of the charges made by the other fellow. Lawyers, doctors, butchers, and bakers come in for their share of criticism of this kind. We ourselves are about the only persons who make reasonable charges for services. What about this blanket charge of extortionate utility rates?

When a Commission finds that utility rates are too high, that does not necessarily mean that they are too high as measured by the value of the service; it means they are too high as measured by the cost of rendering the service. Utility rates could never have been really extortionate; if they had been, the business would not have grown. The telephone business, for example, could never have reached to the enormous proportions it has, if its rates had ever been more than the service was worth. People got along a good many years without telephones. They could do it now, if the service were not deemed worth what is being charged for it.

But we have set up an artificial standard for determining the reasonableness of utility rates, which is based on the cost of rendering the service—including a reasonable compensation to capital. We say that rates which produce more than that are too high; but a rate even twice as high might not be extortionate, as measured by what the rate payer receives from the company.

A little while ago a telephone subscriber threatened to sue a company for $60 damages because his phone line was out of commission for three days. He said that this sum represented what it cost him to do business which could have been transacted by telephone had his line not been out of commission. In other words his telephone would have saved him $20 a day for three days. As this subscriber was doing the same kind of business daily, he was getting a very substantial benefit from his telephone service, in the course of a year, according to his own assertion. As he happened to be on a rural line, perhaps a charge of $3 a month would have been considered too high, measured by what it cost the company to render the service; but a charge of $5 or even $10 a day would not have been extortionate. Even on that basis the subscriber would be receiving $15 or $10 a day more than he paid.

One could scarcely accuse a company of extortion which was putting $10 or $15 a day net into the pockets

of a rate payer. Utility companies must always give back more than they receive, or else go out of business. Most of them give much more to rate payers than they get from the rate payers. The net result of utility operation, after deduction charges, to the rate payers is a very high profit to the rate payers. This point should not be overlooked by utility customers.

Buying on "Bulges"

A domestic drama in one act

Adapted by special permission of and with apologies to
H. I. PHILLIPS

She—Well, what did your Public Utilities Common do today?

He—It went down another 2 points.

She—That's what you get for hanging on. I could have told you.

He—What was I to do? Can I make the market go up? Am I a miracle man?

She—Why don't you do what the brokers say?

He—What do they say?

She—They say to sell on bulges. Here's a broker's statement right here opposite the stock quotations and it says, "Until the market develops a more definite trend we recommend selling on bulges."

He—How can I sell on bulges when there are no bulges?

She—There must be bulges. Brokers wouldn't say to sell on them if there weren't any, would they?

He—I dunno. All I know is that Public Utilities Common hasn't bulged in a month.

She—You mean to say it hasn't had a single bulge since you bought it?

He (sadly)—Nary a bulge, Ida.

She—Well, there must be something wrong; other stocks have bulges, don't they?

He—I suppose so.

She—Look at Laughing Gas Preferred; it's up 2 points today. Isn't that a bulge?

He—If my stock went up 2 points I would call it a burst.

She—Well, why don't you call up your broker and complain?

He—About what?

She—About bulges.

He—Please be quiet, Ida; you're most exasperating.

She—You should call him up and insist upon a bulge.

He—How can he make a bulge? Don't be silly.

She—Well, when you bought the stock he didn't say anything about there not being any bulges in it, did he?

He (wearily)—No.

She—He took mighty good care not to tell you it was a bulgeless stock, didn't he?

He—Yeah; I guess so.

She—Don't sit there and yawn. If you're not interested in our investments I am, and what's more, I'm going to write him a letter right now.

He (sleepily)—All right.

She—I'll tell him what I think of him.

He (just before dozing off)—Go to it, Ida. And listen.

She—What?

He—Tell him you want a lot of big bulges right away or we'll close the account!

The Battle of the Busses

The extraordinary increase in the number of busses in operation in the United States is presenting some pressing problems upon our law-makers and arousing differences of opinion. The bills now under consideration by Congress contain some radical departures in the methods of regulating public utilities. This article outlines some of them.

By JOHN T. LAMBERT

THE next time you see a motor bus pursue the even tenor of its way over a smooth macadam surface or bump along undignifiedly over the cobblestones, you may well say to yourself:

"The fellow is causing trouble in Congress."

A voice is heard to inquire, "Causing *trouble?* What do you mean *'trouble'?"*

Well, if not trouble, at least a serious concern.

Within the past ten years, the motor bus and the motor truck have ambled their way powerfully and importantly into the economic life of this nation. The bus represents a rate of growth "which is unprecedented in the transportation field," according to the estimate made by the American Automobile Association, and that estimate is presumably shared by the railroad and railway corporations which have suffered a constantly diminishing freight and passenger revenue and been forced to the necessity of curtailing or even eliminating altogether many of their short-haul lines.

WHEN anything in the United States penetrates the economic field impressively there invariably arises a demand for "regulation" of it. The demand for regulation of the motor bus and the motor truck has arisen. In fact, it has been lodged in Congress. Senate and House Committees have already held their formal hearings upon the subject. Many a veteran legislator scratches his reflective head, concedes the requirement for regulation and then asks, "But how?"

When a legislator begins asking questions, it can be safely assumed that something has caused him serious concern. It is the motor bus.

The extent to which the bus has become a major factor in the transportation system of the country may be judged from some of the startling statistics which have been poured into the Interstate Commerce Commission and the two Congressional Committees. These statistics show:

That there were 92,400 busses in operation last January 1st as compared with 53,200 but four years ago.

That 23,300 bus operating corpora-

tions, companies or firms were then in existence.

That the busses are operating over 719,500 miles of routes and that they are carrying annually 1,793,000,000 passengers a total of 1,760,000,000 bus miles.

That they represented a total investment of $531,000,000, that their gross revenue had attained an annual total of $366,000,000 and that they were paying taxes, in one form or another, of $22,000,000.

That their bus mileage and total of passengers carried had practically doubled in the past four years.

MANY interesting details might be elicited from those statistics, including the fact that 40,000 school busses are in operation and that electric and steam railways were using 12,000 busses in supplement of their rail services, that one motor coach company operates 569 busses and that seventeen of the largest companies employ 3,654 busses regularly and that the bus owners spend $80,000,000 annually for supplies. But the basic facts as above stated "tell a mouthful" that requires no amplification.

The noisy clattering of the motor bus over the hard pavements does not destroy its somewhat romantic entrance into the national theater of transportation. Commissioner John J. Esch of the Interstate Commerce Commission viewed the entire system of transportation through poetic eyes. To him was assigned the broad task of probing the necessity for "regulation" and in a comprehensive report he devoted the following to a picturesque description of transportation's important contribution to the country's marvelous development:

"Indian travois and canoe, ox cart, pack horse, Conestoga wagon, stage coach, canal barge, steamboat, steam railroad, electric railway, motor vehicle, airplane—these words spell the progress of transportation in America.

"In a nation composed of many states, each sovereign in its own sphere, extending over a vast continent with sectional interests conflicting at times, diversity of climate, extremes in topography, and differing economic interests, no other instrumentality has so served to preserve and maintain its political unity as its transportation system.

"The economic structure of the United States progresses almost directly in relation to the development and efficient functioning of its transportation facilities. Settlements in the beginning were chiefly on or near the coasts or on navigable waterways. The steam railroad prepared the way for the peopling of vast domains and afforded ready communication between the different parts of the country. The first railroad enterprises met with opposition from existing forms of transportation and the value and utility of the railroad as an agency of commerce and of communication was not immediately recognized.

"The era of railroad expansion marked the beginnings of great industrialization. Industrial centers were linked together and distribution throughout the vast areas of the country was made possible. Without such a transportation system the present industrial development could not have been attained. Then came the electric railway. There was needed, however, some agency which would permit the fullest development of the country's economic situation by permitting transportation and communication to reach remote communities through territory not able to support costly railroad facilities. The need has been supplied by motor vehicle transportation, flexible and com-

posed of small units, so that many remote communities are now served by such agencies and enjoy the benefits of practically direct rail service."

THE earliest demands for regulatory control of the new arm of transportation seem to have arisen in the communities where bus popularity actually grew with remarkable rapidity. In some places the demands were stimulated and encouraged by the older rival means of transportation, but as the railroads and railways gradually adopted busses for feeder systems they, too, grew aggressive in these demands.

Irresponsibility crept into the bus system. It offered a new attraction to investment, and adventurous souls of limited means sought the new avenue to quick financial enrichment. Accidents happened, and liability insurance was found to have been among the missing. When business fell off, lines and routes were abandoned. There was no guarantee of continued service. The bus operator was required to build no track. He could buy his bus on easy credit. It was feared that the highways would become overcrowded.

Local and state regulations were naturally the first ones to be adopted for protection of the public and for the protection, too, of the stable and substantial companies which went into the business with an appreciation of their responsibility to society. But the matter got up to the supreme court and a decision by that body that the states were without authority to regulate bus traffic in interstate commerce threw utter confusion into the entire system.

THE "wildcatters," as may be expected, took immediate advantage of that confusion. They established routes in populous centers to snare short-haul traffic away from the street railways and they defied local regulations by engaging in a *pseudo* interstate carriage of passengers. It is said, for example, that one bus company operating between close centers of population in Little Rhody, near the Massachusetts line, crossed into the Bay State a few hundred yards, drove around a little cemetery and re-entered Rhode Island without ever picking up or delivering a single passenger across the line. Hard-shelled authorities denounced his evident evasion of the practical regulations, but the regulations were found to be none too practical to cope with it.

So, the Interstate Commerce Commission decided to make a comprehensive survey of the bus situation from a national standpoint. The investigation was undertaken by Mr. Esch and the entry of counsel before him consumed eleven pages of his printed report. A score of railroads, auto manufacturers, produce and fruit growing exchanges which rely on the motor truck for their deliveries and the Public Utility Commissions of all the states were among those represented. The legal entries read like a list of "Who's Who" in the advanced legal profession of the nation.

Out of these hearings and Mr. Esch's report came the proposed legislation for regulation of the busses now being studied with some doubt and possibly with little eager enthusiasm by the two committees of Congress.

THE original plan proposed to include the motor truck. Statistics, always interesting, even if doubtful, record 2,896,886 motor trucks in operation in this country last year. About 2,375,000 of them, or 82 per cent, were said to be privately owned and operated; that is, they were in the exclusive use of the corporations which owned them and employed them for the immediate purposes of the corporations. As an illustration, the associated Bell Telephone Companies were credited with 13,075 trucks, used solely for telephone purposes. The Standard Oil Company had registered in excess of 8,000 trucks, every one of which performed a service solely for that company and was not for hire. About 203,000 trucks only, or 7 per cent of the total, were found to be in any sense common carriers and the number was so negligible that they were dropped from the proposed legislation.

IN avoidance of cluttering detail, the scheme of the legislation now pending before the two committees can be described briefly and in general terms as follows:

1. Busses to engage in passenger carriage would first be required to obtain a certificate of public convenience and necessity.

2. They would be required to secure liability insurance, sufficient to indemnify all damage to passengers and freight.

3. They would be required to limit themselves to "just and reasonable" rates.

The pending bills contain much language about rates but a close reading of them causes the belief that they vest in the government, national and state, absolutely no power to fix the exact rate or fare for passenger transportation. Seemingly, the government is limited to prescribing where and how the rates adopted by the companies shall be posted, but it can exercise only an influence like that of a news editor who allots the space in a newspaper but has no say as to what shall go into that space or that of a billposter who designates where an eight-sheet shall be posted but whose authority there stops.

THAT source of knowledge mysteriously known as "inside information" in Washington reveals with alleged accuracy that the bus owners protested against the grant of power to fix rates. Their protest was based upon the assumption that the railroads and street railways exert an invisible influence upon the state and national regulatory bodies with the result that high fares would be imposed which would drive the passengers from the busses to the older systems of transportation. The railroad managers asserted that this was ghost talk. They believe that the natural economic forces of competition will control fares. In any event, they were anxious to present an unanimous front to Congress and they did not press for the inclusion of a definite rate-fixing section in the proposed legislation. There is ample belief in Washington, however, that if Congress ever bucks up to its task, the rate-fixing provision will be incorporated.

The proposed legislation contains a radical departure which will be of prime interest to the students of regu-

latory legislation. It provides that the Interstate Commerce Commission shall delegate its authority in this bus transportation regulation to the states. In all matters affecting interstate bus traffic, the regulations would be imposed and the disputes adjusted by a Commission consisting of one member from each of the Public Service Commissions in the states affected. An order by the national Commission would promulgate the decision reached by the Commission representative of the states affected, but this would be largely a routine procedure. However, such decisions could be appealed to the national Commission.

In short, the Interstate Commerce Commission would amount very largely to a court of appeals.

IN the hearings already held by the House and Senate Committees there was evidence of some opposition to such a delegation of authority to the states. Its constitutionality was questioned, how seriously the records do not adequately reveal. But the practice, or precedent, thus to be established, came in for a good deal of questioning. One solon was constrained to believe that with the precedent thus established, the next step might be to confer to the state courts some of the rights now exercised alone by the Federal courts and which, the solon seemed to believe, are now designed to guarantee a greater measure of justice to litigants.

Without doubt, the special session of Congress will have passed into history without adopting any regulatory legislation whatsoever with relation to the modern wonder of transportation—the motor bus. In some quarters there is a steadfast and optimistic belief that the regular session beginning next fall will put its best foot forward. This optimism maintains despite the fact that any legislation affecting railroads has walked with trembling feet, if at all, in the past six years.

A Warning to Young Benjamin Franklins

KITE-flying time is always a period of potential danger to children and of anxiety to electric utility officials, who know the serious hazards of flying kites near electric wires.

In addition to the direct personal injury that may result from a mix-up of kite and wires, there is the added peril of possible cross-circuits.

Particular warning is given against the use of kites with metal frames, many of which are on the market. Some cities and towns have already passed laws forbidding the flying of metal framed kites within their corporate limits.

Electrical utility men throughout the country urge all parents to safeguard their children by seeing that kites are flown only where there is plenty of open space free from electric wires of any sort, and preferably when such wires are entirely out of range.

What Others Think

A Plea for Lower Railroad Rates for the Farmer

THE American farmer's lot, according to Professor Seligman, is not a happy one. Many are the conditions that account for the frequent and lengthy laments that have emanated since the War—especially at election time—from our agricultural regions. Many, too, are the soothing syrups that must be administered before quiet is restored and the American farmer is again on an equal footing with his fellow country men. At least Professor Seligman is of this opinion, and among the many pacifiers prescribed one finds one that is to take the form of lower railroad rates for agricultural products.

As far back as 1921 the Interstate Commerce Commission suggested that lower rates for the farmer were needed. Nothing has been done because of the opposition of the industrial shippers, who believed that lower rates for the farmers meant higher rates for themselves. Our present author sees a way out of this difficulty. First of all, the regionalization of the railroads should be hurried, and should be of such a nature as to combine in each of the larger systems primarily agricultural and primarily industrial roads. Then rate reductions are to be granted the farmers; other rates are to remain the same; and railroad earnings are to be protected by having the government give the companies a subsidy equal in amount to the reductions granted. In this way, everyone will be happy—except, possibly, the taxpayer. To Professor Seligman, the subsidy is the less objectionable way out—the other being government ownership of railroads.

There are many objections to this proposal. First of all, there is no assurance that the reduction of rates will cure the main disease—overproduction. If anything, it will encourage larger crops. Even as a temporary measure, there is great danger involved in establishing a precedent of government aid in the form of railroad rebates to depressed industries. Like the protective tariff, every industry will try to gain benefits from government interference. Here the danger is magnified by the fact that there is a money outlay involved that will have to come from taxation.

—ALFRED ABRAHAMSON

THE ECONOMICS OF FARM RELIEF. By Edwin R. A. Seligman, LL.D. 8vo. New York: Columbia University Press. 304 pages. 1929. $3.00.

Some Significant Changes in the Electric Industry

THE Brookings Institution of Washington, D. C., has issued Volume I, Number I of a series of pamphlets on economic subjects. This one is by Charles O. Hardy, and gives the result of a study on "Recent Growth on the Electric Light & Power Industry." The special studies relate to utilization of capacity; capitalization, property values of property capacity; financial structures; revenue and expenses; distribution of income; the cost of new capital; and the prices of common stock of electric light and power companies. A summary of the findings show the following changes from 1920 to 1927:

"1. The proportion of the electric light and power business done by very large corporations greatly increased.

2. The sales of electric energy of the very large units in the industry grew more rapidly than did their generating capacity.

"3. Book value of the electric properties of the very large companies increased slightly more than did their generating capacity, but less than did the actual output of electrical energy.

"4. The facilities of the large companies were utilized a little more fully than were those of smaller companies.

"5. The ratio of preferred stock to total capitalization doubled; the ratio of common stock and of short-term notes to total capitalization decreased; the proportion of bonds showed little change.

"6. Both the gross revenue and the operating expense per kilowatt hour generated decreased.

"7. From 1923 on, the ratio of gross revenues to generating capacity declined.

"8. From 1923 on, the ratio of gross revenues to electric property values declined.

"9. The ratio of operating expenses to gross revenues showed a rapid decline. This decline was apparently due in part to declines in the price of fuel and in part to improved operating efficiency.

"10. Taxes increased slightly in proportion to gross income, the increase being greater in Federal than in state taxes.

"11. The cost of capital borrowed or obtained through preferred stock issues declined sharply, mortgage bond yields declining more than preferred stock yields.

"12. The prices of the common stocks of the large public utility corporations showed an extraordinary increase. This was due to a wide variety of factors including: (a) a decrease in the operating ratio; (b) a decrease in the interest rate paid on borrowings and the dividend rate on preferred stocks; (c) a decrease in the proportion of common stock to total capitalization; and (d) a general increase in the prices of corporate common stocks."

RECENT GROWTH OF THE ELECTRIC LIGHT AND POWER INDUSTRY. By Charles O. Hardy. The Brookings Institution, Washington, D. C. Pamphlet Services, Volume I, Number I.

Publications Received

ON THE COST OF DISTRIBUTION OF ELECTRICITY TO DOMESTIC CONSUMERS. By Morris Llewellyn Cooke. Philadelphia: Published by the author. 26 pages. Undated. Issued without charge.

AMERICA CHALLENGED. By Lewis F. Carr. 8vo. New York: The Macmillan Company. 322 pages. 1929. $3.50.

CIVIL AIRPORTS AND AIRWAYS. By Archibald Black. 8vo. New York: Simmons-Boardman Publishing Company. 238 pages. 1929. $4.00.

It is estimated that approximately 1,000 new airports, the majority of them municipally or commercially owned and operated, will be started within the next twelve months. At the present time there are about 400 municipal and 350 commercial airports, in addition to the government's military fields. Approximately $300,000,000 has been invested in airports during the past 18 months and similar developments during the next year and a half are estimated by the Aeronautics Branch of the Department of Commerce at $500,000,000. This book describes step by step the method of providing a municipality with an airport. What constitutes a good location, the size of the plot needed, preparing the field, layout of buildings, airway identification markings, runway requirements, night lighting, and the equipment needed for an A1A airport is listed and described. The appendix contains much important data, including the Department of Commerce airport regulations, and rules and rates and charges of a model municipal airport. Illustrations and drawings are of 1929 designs and equipment.

Bibliography

STORAGE, HANDLING, TREATMENT, INSPECTION AND TESTING OF INSULATING OILS. *National Electric Light Association;* Publication No. 289–348. 1929. $0.75.

STANDARDS FOR USE IN DESIGN AND OPERATION OF MECHANICAL POWER PLANT EQUIPMENT. *National Electric Light Association;* Publication No. 289–350. 1929. $0.30.

THE REGULATION OF PUBLIC UTILITY HOLDING COMPANIES. By David E. Lilienthal. *Columbia Law Review;* No. 28; pp. 404–440. 1929.

86 UTILITIES REPORT ON ELECTRIC REFRIGERATION. *Electrical World;* No. 93; pp. 677–683. 1929. An analysis of market possibilities.

The March of Events

Public Utilities and the Newspapers

PUBLIC interest in the relations between power utilities and newspapers has been widespread since the introduction of testimony before the Federal Trade Commission in regard to the financial interest of the International Paper & Power Company in several daily newspapers. Mr. A. R. Graustein, president of the International Paper Company and the International Paper & Power Company, testified that his companies had assisted in financing certain publications and in return had obtained contracts which would give them an outlet for the news print which they produce.

The position of the critics of those financial relationships is well expressed in an editorial in the Springfield (Mass.) *Union*, where it is said:

"Power generation and distribution is apparently passing into an interstate business calling for interstate regulation. Intrinsically there is nothing inimical to public interests in this development nor in the mergers or alliances that are in evidence. But actually it may be inimical to public interests unless it is properly and effectively regulated in fairness to all parties.

"For this reason a newspaper in serving the public interest should not only be free to express its own opinions and convictions but free from any conditions that in the public mind would in appearance, if not in fact, color its views or expressions. When, therefore, interests engaged in financing and developing power resources buy control of a newspaper, in our opinion they are hurting the newspaper more than they are helping themselves."

The New York *Times* has commented as follows:

"Senators Norris and Walsh have pointed out that the Federal Trade Commission has lately discovered persistent propaganda activities by the power interests generally attempting to work through newspapers. Much of this has been futile, much of it has been foolish, but some deliberate poisoning of the well of information has been revealed. The whole foundation of honest journalism is laid on the principle that newspaper ownership should have no interest save in publishing facts and making fair editorial comments on them."

An editorial in the *Herald* and the *Traveler*, of Boston, declared in reference to the stock acquisition in the Boston Publishing Company by the International Paper Company:

"It has been felt that a close contact between a great producer and a great consumer of white paper would work out to the advantage of both companies, the readers of each newspaper, and the community. That is the whole significance of the transaction. A plain, open, above-board arrangement, long contemplated, has been finally effected, and made known in a plain, open, above-board manner. Any inference that the purchase of stock in the Boston Publishing Company by the International Paper Company means a change in the policy of the *Herald* or the *Traveler* is altogether false. The internal affairs of each paper will remain the same. The policies will remain the same. The aim will remain the same—to produce first-class publications day by day."

California

Car Fare Hearing Advanced

THE Supreme Court on April 29th advanced for hearing on October 21st next the appeal of the Commission and the city of Los Angeles seeking to prevent the Los Angeles Railway from increasing its street car fare to 7 cents, or four tokens for 25 cents.

The Commission had refused to grant the street railway company the increase from its old fare of 5 cents and the company appealed to a Federal Court, which authorized the company to increase the rate to 7 cents, with the rate of 25 cents for four tokens, requiring a bond of $50,000 to reimburse passengers should the decision be reversed by the Supreme Court. Refund tickets or coupons are being issued to passengers in the meantime.

Pacific Electric Fare Increase

THE hearing on the application of the Pacific Electric Railway Company for increased fares was begun before Commissioner L. O. Whitsell on April 26th and was then adjourned until May 21st, following a day spent in hearing witnesses in support of the company's contention that higher fares are necessary.

F. E. Johnson, representing the Northwest Chamber of Commerce, stated that he had investigated conditions of some ten or twelve eastern interurban systems and had compared conditions in southern California with them. In view of the comparative costs and fares he questioned the efficiency in management of the local company.

Attorney Frank Karr, the company's chief counsel, immediately demanded that Mr. Johnson be placed on the witness stand and made to qualify as to the extent of his investigation of other interurban systems. Mr. Johnson, says the Los Angeles *Times*, did not press his question of inefficiency further.

Many Southern California communities served by the Pacific Electric Company were represented by counsel. They bombarded with questions the witnesses produced by the company to show the necessity for increased fares.

New Phone Inquiry

THE Commission has ordered an investigation into the rates, rules, and practices of the Southern California Telephone Company, and also of the Pacific Telephone & Telegraph Company and the United States Long Distance Telephone Company with reference to their connection with the Southern California Telephone Company. This order followed testimony of Lester Ready, expert for the Commission, at the hearing on the Pacific Telephone & Telegraph Company's application for higher rates in the San Francisco area. The inquiry is scheduled to start on June 7th at Los Angeles.

Colorado

Dotsero Cutoff

A CONDITIONAL permit to build the Dotsero cutoff has been granted by the Interstate Commerce Commission to the Moffat road. The Commission required that a joint track agreement be entered into whereby the Denver & Rio Grande Western could operate over the cutoff, through the Moffat tunnel and over the Moffat tracks into Denver.

The Denver & Rio Grande Western had contended that no permit should be issued except on this condition. It argued that the maximum public benefit from the cutoff, which would reduce the distance between Denver and the Western Slope by 173 miles, could be had only through Denver & Rio Grande Western operation of the cutoff.

The cutoff would be 41 miles long, running between Orestod and Dotsero and connecting the main line of the Rio Grande with the Moffat road a short distance west of the Moffat tunnel. The cost was estimated by the Commission at not less than $3,000,000. The plan was to finance it with bonds to be sold by the Moffat road.

Commission Opposes Leadville Track Abandonment

A RECOMMENDATION that the Interstate Commerce Commission deny the application of the Colorado & Southern Railroad for abandonment of the Denver-Leadville branch, says the Rocky Mountain *News*, has been fowarded to Washington by the Colorado Commission. This action on the part of the State Commission is the outgrowth of a joint hearing conducted in January before the State Commission and a special examiner for the Interstate Commerce Commission.

The railroad maintained that this branch was operated at a loss for many years, but the Commission declared that it was ready to co-operate with the Interstate Commerce Commission and the railroad in effecting economies of operation and necessary reductions in the present transportation services offered within reasonable needs of the shipping public.

The Commission has pointed out that over a period of three or four years there has been a gradual revival in mining in Lake, Park, and Summit counties, and that the railroad may soon expect a further revival and further increase in freight traffic.

District of Columbia

Submetering Controversy

THE Public Utilities Commission will stand pat on its recent ruling, which authorized the Potomac Electric Power Company to refuse to sell service where submetering is practiced, Ralph B. Fleharty, people's counsel, is quoted in the Washington *Times* as stating.

Answers to the suit instituted in the District Supreme Court against the Commission and the power company to restrain them from executing the anti-submetering order are said to be in the course of preparation, and the Commission is prepared to fight to maintain its right to issue such regulations.

The individual who goes into the business of submetering is immediately in the utility line, according to the contention of the Commission as reported in the *Times*, and is thereby subject to any and all regulations the Commission may make in regard to sale of power. The account continues:

"The practice, it is claimed, is taking business from the power company by the individual who buys the current at a low rate and sells it to his tenants at the same rate the company charges the individual.

"If some service were rendered by the persons engaged in submetering, the condition would be changed, the Commission holds. Even under such circumstances, they doubt if it could be shown the individual was rendering a service that would justify his selling power at a rate higher than that paid by himself."

Illinois

Phone Rate Litigation

EVIDENCE introduced in the Illinois Bell Telephone Company case before Federal Judge James H. Wilkerson indicated that on the company's claim of a valuation of $173,000,000 for the physical properties, the earnings in 1928 were 5.15 per cent. This showing was contrasted by city representatives with a recent report that the American Telephone & Telegraph Company, which owns the Illinois Company, would issue bonds with stock rights that are figured to amount to a bonus to stockholders of $106,000,000. This was said to be inconsistent with the plea of the local company that a reduction in rates would amount to confiscation of its property.

The city has been contending that a 5 per cent return on the Chicago property is sufficient with earnings from other subsidiaries to enable the American Telephone & Telegraph Company to pay a dividend of 9 per cent. The valuation has also been attacked as excessive.

Expenses incurred by the city in its litigation have been under examination in the city council, where the finance committee has recommended an additional $250,000. The appropriation was ordered deferred on May 1st and published by the council to come up at a later meeting.

Indiana

Suit Attacks Gas Transfer

LITIGATION attacking the right of the city of Indianapolis to take over the Citizens Gas Company under the terms of the contract of 1905 between the promoters of the company and the people of Indianapolis was started early this month when holders of common stock certificates brought suit in the Federal Court to prevent the transfer to the city on the ground that this would result in confiscation of property without due process of law.

It is sought to have the court restrain the city from attempting to acquire the gas company property and assets except by condemnation proceedings provided for by the Indiana Utilities Law; restrain the trustees and directors of the gas company from making redemptions of common stock certificates; and to quiet perpetually the city's claim to title of the gas company's property.

The terms of the 1905 contract, which were written into the franchise, into the company's articles of incorporation, and on the face of stock certificates, gave the city the right to take over the property whenever the face value of stock certificates had been paid off, together with 10 per cent annual dividends. Enabling legislation was passed at the last session of the legislature which caused a city utilities' district to be created for management of the property when it is taken over.

Tentative dates for presentation of evidence and hearing of oral argument have been agreed upon. Oral testimony or writ-

ten stipulations on the facts will be presented June 21st. Argument is scheduled for October 3rd and 4th. It has been agreed that no payments for the liquidation of the common stock will be made without thirty days' notice to the plaintiff. This will have the effect of suspending the 20 per cent redemption amounting to $5 on each common share which was scheduled for May 15th. It removes the need for a temporary injunction.

The principal grounds of the suit are: (1) That the 1905 contract was abrogated by the surrender of the company's franchise in 1921; (2) that the 1929 law legalizing the ownership terms appearing in the company's articles of incorporation is confiscatory; (3) that the city forfeited its claim when it failed to give notice to company at the surrender of the franchise in 1921, and (4) that the original term of the franchise, twenty-five years, violated the common law rule against perpetuities.

Iowa

Relief from Paving Obligation

STREET railways are partially relieved from the burden of paving between tracks by recent legislation in Iowa. The new law provides that street railways shall provide a suitable foundation for the track of a width equal to their ties, but in no case less than the width comprised between lines lying one foot outside of each rail of the track, and shall be assessed for the construction or reconstruction of paving between the rails of their track or tracks, and for one foot outside of each rail thereof, in the amount that the cost of such pavement per yard of area exceeds the cost per yard of the remainder of the paving upon such street.

Street railway companies are also required to make all repairs between and one foot outside of the rails made necessary by the operation of the railway and any other repairs made necessary by its operation.

Kentucky

Object to Court Threat

A THREAT of the Louisville Railway Company to carry its rate case into court, says the Louisville *Herald-Post*, has been referred to by R. W. Lewis of the Taxpayers' League "as an insult to the citizens who aroused the people to fight the proposed increase." At a recent meeting of the league public utility questions and rate increases were reviewed and opponents of higher car fares were allowed to air their opinions.

Maine

Protest Telephone Rates

A HEARING was held before the Commission on April 30th on the complaint of several citizens in the town of Belgrade against the Maine Telephone & Telegraph Company alleging that rates are excessive, unreasonable, and unjustly discriminatory. Objection is made against toll rates.

The case was held open in order that the telephone company may make a study for the benefit of the Commission to determine the effect on the revenue of the company by abolishing the surcharge from Belgrade to Augusta and substituting the basic toll rate of the New England Telephone & Telegraph Company, of which the Maine Company is a subsidiary.

Rate Hearing at Kittery

ELECTRIC rate hearings were opened on May 2d at Kittery. For some time Kittery and Eliot have been protesting that rates were too high. A revision of rates was recently announced but a citizens' committee declared the revision to be unsatisfactory.

Complaint was made that new rates were

beneficial only to those who consumed more than 40 kilowatt hours per month. A comparison was made by attorney Charles E. Gurney of Portland, counsel for the New Hampshire Gas & Electric Company, showing that there was a reduction in the monthly rate for consumers who used less than that amount.

The so-called area charge, determined by fixing a charge based upon either the number of rooms or on the number of square feet in a house, was criticised by the representative of the town as a "snare and delusion." In reply Mr. Gurney declared that the rate charged was believed by the company to be a fair rate for electricity and at the same time gave the company a fair return on the investment.

On May 3rd the hearing was adjourned to be resumed on July 9th.

Maryland

Commission Files Briefs

THE Commission on April 30th filed in the United States Supreme Court two briefs in support of its order denying to the United Railways a straight 10-cent fare.

One of the briefs was on a petition for a writ of certiorari asking the Court to review the fare case. In support of this petition the Commission declared that the decision of the court of appeals determines a Federal question of substance not heretofore determined by the Supreme Court; namely, whether the company would be deprived of its property without due process of law, within the prohibition of the 14th Amendment to the Constitution, by the action of the Commission in calculating the company's annual allowance for depreciation so as to restore to the company the cost of its depreciable property consumed or retired in service rather than the present value thereof. It is asserted that the decision of the court of appeals, holding as it does that the annual depreciation allowance should be so calculated so as to restore to the company the value of its property, instead of the cost originally, is not in accord with decisions handed down by the Supreme Court.

The second brief includes a statement of the reasons for the Commission filing a cross appeal after the traction company had taken the case to the Supreme Court. The Commission attorneys cite cases in behalf of their contention that the Supreme Court has jurisdiction and say the Commission is fully empowered to raise the questions presented for review.

Both the railway company and the Commission have agreed that the case should be moved up on the docket of the Supreme Court for an early hearing. It is said to be unlikely, however, that the appeal will be heard earlier than October.

Massachusetts

Action on Utility Bills

THE House Ways and Means Committee on May 1st reported a re-drafted power and light bill to the legislature, in which there are two principal changes relating to the authority vested in the Department of Public Utilities in connection with the taking over by cities and towns of privately owned plants. The bill was passed by the House on May 6th, and then went to the Senate.

One amendment provides that if only a portion of a local plant is taken, the company affected shall have a claim for severance damages which shall be considered by the Department. The other change provides for the taking from the Department the power of determining the propriety of the establishment of a municipal lighting plant.

The new law provides that a city or town may take such a portion of a privately-owned plant as can be agreed upon and only upon approval of the city authorities, and in case of a town, ratified in town meeting. In the event that a town which votes to establish a municipal lighting plant fails within one hundred and fifty days from the passage of the final vote to agree as to price or as to the property to be included in the purchase, either such town or such person or corporation may apply to the Department of Public Utilities for a determination as to the matter.

Provision is also made for authorization by the Department of the extension of mains or lines into adjoining town. Another section provides that any town which is authorized to engage in generating or distributing electricity may make contracts for terms not exceeding ten years with street railways for the purchase of electricity from such companies in order to furnish electricity for municipal use, or for the use of its inhabitants, or both.

Boston Gas Rates

THE Department of Public Utilities on May 1st continued hearings on the application of the Boston Consolidated Gas Company for a revision of its rates. President Dana D. Barnum of the company testified that the majority of those who do not pay their gas bills are in the small customer class, most of whose bills are not high enough to defray the cost of giving them service. Mr. Barnum asserted that the company is engaged in selling to the small users, such as the householder, a convenience and service even more important than the actual sale of the commodity itself. To the large users, he said, the Company just sells gas.

The utility company has been asking for a 50-cent monthly service charge. The new schedule would mean a decrease for the larger domestic users and an increase for the users of small amounts, especially apartment house residents.

Wycliffe C. Marshall, for the petitioners, contended that there should be a reduction in the rates. He believed that through reduced rates there would be an increased use that would net the company more profit than now. Samuel H. Mildram, utility expert, opposed the rate proposed by the utility.

Rates Again Suspended

THE sliding scale of rates asked by the Fall River Gas Works Company and affecting its customers in Fall River and Somerset has again been suspended by the Department of Public Utilities, which has now set June 1st as the date before which it will submit its ruling. The petition for the new rates was filed in January.

The postponing order carried no notice of further hearings on the matter of rates in Fall River, where the gas company proposed a higher rate for the small users and a lower rate for the larger consumers, the reduction being placed on the volume consumed.

Missouri

Application of New Rates

A LETTER from the Commission to the Laclede Gas Light Company, reported in the St. Louis *Globe-Democrat*, asked the utility to eliminate discrimination in the application of its new rates which became effective on April 6th. It is stated that the company had been basing its new rates on meter readings on or after April 6th with the result that the new rates have been retroactive, going back into March, when the rates prescribed in the old schedule were presumed to have been still in full effect.

Hence a consumer whose meter was read on April 5th would get his month's gas at the old rate, while a consumer whose meter was read one day later would have to pay under the new rate. The Commission suggested that the company remove the discrimination by some method—for instance, by prorating the bills to the best of its ability on some basis, such as the number of days the gas was used by the particular customer before the effective date and following the effective date between meter readings.

New Jersey

Rate Hearings Resumed

THE municipalities' fight before the Commission against the proposed gas rate adjustment of the Public Service Electric & Gas Company was renewed at a hearing on May 6th. The new schedule was to have been effective January 1st, but has twice been suspended for periods of three months by the Commission in order to give the parties an opportunity for preparation.

Those opposing the revision declare that the new rates would increase the cost to small users and decrease it to large users, while the company contends that under the proposed adjustment the small consumer will be forced to pay a proper share of the cost of serving him.

A report by Lucas & Luick, Chicago engineers engaged by the Commission to make an investigation of the proposed adjustment, figures prominently in the case. The report was favorable to the changes suggested by the company.

Grade Crossing Legislation

AN unsuccessful effort was made during the recent session of the legislature to secure legislation which would bind the state to a definite policy in grade crossing elimination. A legislative committee has been kept alive to make a further study of the problem and report to the next session of the legislature. The general scheme in this connection is to secure the necessary funds for elimination by an additional gasoline tax.

New York

Decision Reserved in Transit Case

AT the hearing before the United States Circuit Court of Appeals on motions of the Transit Commission and the city for reversal of Judge William Bondy's injunction against them in the Interborough Rapid Transit Company's ancillary fare suit and for dismissal of the suit itself, decision was reserved; but it is reported in the newspapers that there were indications that the motions would be granted.

Soon after Samuel Untermeyer began argument of the case for the Commission, Judge Manton advised him that the court felt that it did not need to hear counsel for the city and Commission and would listen only to William L. Ransom, special counsel for the Interborough Rapid Transit. Mr. Untermeyer, however, insisted, after Mr. Ransom's argument was ended, on clearing up some points. Judge Manton interrupted him several times and sought to close the argument.

"We've about made up our minds on this case," he said. "If you insist on talking, we may change our opinions."

Mr. Ransom said that the company's contention was that all of its original case, except the fare contract issue, should be permitted to remain in the district court pending the outcome of the state actions. In the ancillary case, he argued, Judge Bondy's injunction against car and platform orders should remain in force and the injunction modified only to permit going forward with the state suits in so far as they involved the fare contract.

Pennsylvania

Chambersburg Gas Rates

REVISED rate schedules to become effective June 1st unless suspended by the Commission have been filed by the Chambersburg Gas Company. It is stated that they will increase the monthly bills of 500 customers, will have little effect effect on 1500 customers, and will decrease the bills of 850 customers.

The small users of gas are the ones who will have to pay more than they do at present. The present net rate is $1.80 for the first thousand cubic feet. The new rate would be $1.50, net, but it would apply only to the first 300 feet. For the next 1700 feet per month the net charge is $1.20, for the next 3000 feet $1.10, and for all over 5000 feet per month the rate is 95 cents.

The company has also adopted a schedule for house heating. The contract for this class of service runs from October 1st to June 1st and the consumer pays $1 per meter per month during the heating season, in addition to which there is a reserve capacity charge of one cent per square foot of required hot water radiation, while the charge for gas consumed is at the rate of 80 cents per thousand feet.

Optional rates are provided for industrial and commercial service. These give a consumption charge of $1 per thousand for the first 20,000 cubic feet used per month. For over 100,000 feet the rate drops to 70 cents.

Texas

New Utilities Bill

A PUBLIC utilities regulatory bill was introduced in the Senate on April 29th, which bill is similar to the "city attorneys" measure put forward in the last session but which never reached a vote.

The present bill omits a clause which the utilities have desired; namely, that a municipality be required to pay an adequate

price for existing utility facilities before installing a municipal system.

Neither would the bill permit the utilities to raise rates or prevent a reduction, pending a hearing before the Commission, merely by posting a bond. The Commission would have power to make whatever adjustment is thought desirable before the hearing.

All utilities operating in the state would have to have a Texas charter under the proposed law.

The Commission, which would be appointive and would consist of three members, would have appellate jurisdiction only over incorporated cities and towns, the municipalities having the original jurisdiction.

Vermont

Uniform Accounting

HEARINGS on a proposed uniform classification of accounts were completed by the Commission during the latter part of April, and the Commission and utility representatives are now seeking to perfect a system.

Chairman Harry B. Shaw, of the Commission, says the Montpelier *Argus*, explained the reason for uniform classification and how such an act was brought before the recent session of the legislature. He said the Commission had always acted with the understanding that it had authority to require reports from public utilities, and had always received such reports until one utility challenged this power. As a result the bill was brought in the legislature to clarify the situation.

George L. Blanchard, of the Capital City Gas Company of Montpelier, stated that he was not opposing the proposed system, but believed that as long as companies furnished the data required by the Commission in reports in the form desired by the Commission it was sufficient, and they should not be compelled to go to bookkeeping expense to keep a complicated system of accounts. The members of the Commission discussed the matter with Mr. Blanchard and asked him to make a more detailed study and make any suggestions he thought best.

The New England Telephone & Telegraph Company was represented by George R. Grant, general attorney, who presented the case of the small companies identified with the Telephone Association of Vermont. His remarks were supplemented by those of Fred More, general auditor of the company.

There was no opposition to a uniform system so long as it would not be too complicated. It was finally decided that the telephone companies should bring in a substitute work order system for the consideration of the Commission.

Virginia

Gas Arrives!

DAILY familiarity with public utility service prevents a full appreciation on the part of most people of the real value of such service. A news item in the *Valley Virginian* of Waynesboro reminds us of the days when utility service was not common and when the arrival of such service was an historic event. The article reads:

"Gas—for the convenience of Waynesborians by May 1st. History is being made daily in Waynesboro! May 1st, brings the use of gas for all purposes here, the end of this week connects the two lines that were started some weeks ago, one from Staunton the other from Waynesboro. Only one more mile of pipe line to lay, is the cry of the men and the official personnel of the Consumers Utilities Company of Staunton, who will in the future be as much a part of Waynesboro as they are at present of Staunton. The scene of the final connecting of the main service line will take place near Fisherville the latter part of the week."

The paper goes on to say that this will be cause for an informal celebration—such a celebration we may imagine as that which occurred when the transcontinental railroad lines were finally completed.

Rural Electrification

THE commission appointed by Governor Byrd to confer with representatives of the electric power companies of Virginia with a view of working out a practical plan for supplying current to Virginia farmers met in Richmond on April 23d. Power officials participating in the rural electrification conferences agreed that capital to an unlimited extent was available under a reasonable plan and that present utility machinery and capital resources are sufficient to handle all early demands for rural extensions.

The rural electrification plan, says the Lynchburg *News*, probably will mean the expenditure of more than $1,000,000 upon electric lines to Virginia farms.

Recommendations were to be based on a report submitted by an auxiliary subcommittee of the commission. A scheme for spreading the expense among consumers and enabling utility companies to finance such service without hazard is contemplated. The commission would set minimum specifications for construction to prevent wastage of capital and the Corporation Commission would have authority to inquire into all cost figures for a contract period of from one to four years.

Goshen Pass Waterpower

LEGAL points upon which the entire future of Virginia's new Water Power Act may depend are developing in the controversy before the State Corporation Commission over water power development in the Goshen Pass. This development is being opposed by the Garden Clubs of Virginia, and in the arguments over the case the question of state jurisdiction has come up.

The main point at issue, says the Lynchburg *News*, seems to be the state's control of the beds of streams, and if the Commission in its review of Virginia land laws finds that the state has no title to the beds of certain streams, the foundation for many provisions of the Water Power Act may be undermined. The question of the definition of a navigable stream also is in issue.

The source of the law has been traced back as far as 1719. If the title to the Goshen Pass land originally included the beds of the streams and no law since has deprived holders of the old grants of the stream beds, these streams would still seem to be private property outside of state jurisdiction.

Under the Water Power Act the term "waters of the state" is defined as waters whose beds are owned by the Commonwealth.

Wisconsin

Utility Bills in Committee

HEARINGS were held during the latter part of April and the first part of May, by the assembly's committee on judiciary, on a number of bills concerning public utilities. These measures include a proposed constitutional amendment to allow the state to enter the field of generating and distributing electricity, a bill to permit municipalities to operate power plants in competition with existing privately owned concerns, and a bill authorizing municipalities and their surrounding rural areas to organize power districts.

The legislation has been supported by the Wisconsin League of Municipalities. It is stated that the aim of the league is, in effect, enabling legislation to permit the state to get into the electric light and power business such as the province of Ontario has by creation of the Hydroelectric Power Commission.

The adherents of this program have attempted to show that the rates offered by municipal utilities are lower than those of private companies, that competition by municipal utilities drives down electric rates, that municipal ownership reduces and finally eliminates capital charges, and that other advantages inure to municipal ownership in the way of retention of surplus earnings, lower costs, and better co-ordination of public services, better utilization of natural resources, more industrial development, and lower domestic rates.

The opponents of these measures dispute these conclusions and assert that an analysis of the statistical tables in support of the conclusions shows many of the figures to be incorrect to such an extent that the tables themselves are unworthy of further consideration. Some of the comparisons are alleged to be improper and unfair.

G. C. Neff, vice president of the Wisconsin Power & Light Company, declared that statements by Alvin C. Reis that through public ownership Wisconsin could obtain as low electric rates as exist in Ontario are "absolutely false."

"Wisconsin can never have a Niagara Falls, and unless operating conditions change materially, no amount of legislation or anything else can bring rates down to those now existing in Ontario," he said.

Mr. Neff also declared a fair comparison would show that the average rates charged by municipally owned plants are higher than those charged by private companies. This statement was challenged by Mr. Reis.

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COMPRISING THE DECISIONS, ORDERS AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

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PUBLIC UTILITIES REPORTS

CALIFORNIA RAILROAD COMMISSION.

RE LOS ANGELES GAS & ELECTRIC CORPORATION.

[Decision No. 20210, Case No. 2506.]

Rates — Commission investigation — Electricity.

A Commission instituted an investigation into the entire rate structure of an electric company which had voluntarily filed a proposed reduction of 25 per cent for a single class of electric business.

[September 11, 1928.]

PROPOSED reduction of electric rates for ornamental street lighting; proposed schedule approved and further investigation ordered.

Appearances: Paul Overton, for Los Angeles Gas & Electric Corporation; Jess E. Stephens, City Attorney, George Warren and James L. Ronnow, deputies, for city of Los Angeles; James Garrison, *in propria persona.*

Decoto, Commissioner: Los Angeles Gas & Electric Corporation, on February 15, 1928, tendered for filing a schedule reducing by 25 per cent its rates for electricity furnished for ornamental street lighting, but proposed no change in its rates for other classes of electric service. This proposed reduction for a single class of its business was of such a striking nature that the Commission felt impelled to order an investigation of the entire rate structure of the company. In the investigation thus ordered public hearings have been held and the matter has now been submitted.

While most of the testimony adduced had to do with the rates proper for ornamental street lighting, this class of the company's business is of relatively little importance to either the company or its consumers, the total revenue from ornamental street lighting being less than 1 per cent of its entire electric revenue. A 25 per cent reduction in its ornamental street lighting rate would effect a saving to its consumers of but $8,000 a year.

A consideration of the evidence bearing upon ornamental street lighting rates indicates that the schedule, which is authorized in the order, represents a reasonable rate and one which would require this type of service to bear its fair proportionate share of the cost of operation of the entire system. It represents a substantial reduction from the old rate but in form is more equitable than a straight kilowatt hour rate, which was what the company proposed.

As to the other rates involved in the proceeding, the evidence tends to show that the company, in its electrical business, is in a prosperous condition [1] and that its other rates are possibly out of line and should be reduced as well as its rates for ornamental street lighting. The evidence before the Commission is not, however, sufficiently complete to justify a final determination in these respects.

Under all the circumstances it seems appropriate to dispose of the matter of ornamental street lighting rates at this time but to reserve jurisdiction in this proceeding respecting the general earning position of the company and respecting the reasonableness of its other rates. It may be that the company will see fit to tender a reduction in some or all of its schedules.[2] If it does not do so within a reasonable time the Commission will be in a

[1] The company's exhibits showed a return in 1927 of 7.56 per cent. The decisions and records of the Commission indicate that other large power corporations have voluntarily reduced rates to the point where their earnings were below this level. It should be pointed out that the company's figures have not been checked. If they were, its return might appear higher than thus indicated.

[2] While the reduction proposed by the company was somewhat spectacular in nature, it meant very little to the company's consumers. On the other hand, a reduction in its commercial or domestic lighting schedules would benefit a large number of its consumers.

position to reopen this proceeding, take additional evidence, and proceed to a final determination respecting these other rates without the necessity of ordering a new proceeding therefor.

CALIFORNIA RAILROAD COMMISSION.

RE SOUTHERN CALIFORNIA GAS COMPANY.

[Case No. 2463.]

RE LOS ANGELES GAS & ELECTRIC CORPORATION.

[Case No. 2464.]

RE SOUTHERN COUNTIES GAS COMPANY.

[Case No. 2465, Application Nos. 12965, 13477.]

CITY OF LOS ANGELES

v.

LOS ANGELES GAS & ELECTRIC CORPORATION.

[Case No. 2453.]

[Decision No. 20448.]

Valuation — Consumers' advances.

1. Consumers' advances in aid of construction being available to a utility without payment of interest will be treated as a proper deduction in determining a rate base, p. 6.

Depreciation — Use of life tables — Variation of average figures.

2. Notwithstanding the fact that a depreciation annuity is calculated on the basis of the expected life span of many items going to make up the complete property, the fund should be treated as a whole and consideration should not be given to the chance variation of the average of any particular class of equipment or single item, p. 11.

Return — Risk of enterprise — Natural gas.

3. A return of 8.33 per cent was held excessive for a large gas distributing utility incurring no exceptional hazard and rates were adjusted to reduce such return to approximately 7½ per cent, p. 11.

[November 13, 1928.]

APPLICATION of gas utilities to increase rates; rates adjusted.

Appearances: Jess E. Stephens, City Attorney, and James

L. Ronnow, Deputy City Attorney, for the city of Los Angeles; Clyde Woodworth, City Attorney, for the city of Inglewood; H. G. King, for Culver City; Chester L. Coffin, City Attorney, for city of Santa Monica; Paul Overton, for the Los Angeles Gas & Electric Corporation; Thomas J. Reynolds and Hugh Gordon, for the Southern California Gas Company; LeRoy M. Edwards, for the Southern Counties Gas Company; J. J. Deuel and L. S. Wing, for the California Farm Bureau Federation, and all incorporated communities of the county of Ventura, excepting the city of Ventura; R. C. McAllister, City Attorney, and Leonard Diether, Deputy City Attorney, for the city of Pasadena.

Seavey and **Decoto**, Commissioners: The complaint of the Los Angeles v. Los Angeles Gas & E. Corp. alleges that domestic and commercial gas rates, fixed in Decision No. 17830, rendered December 31, 1926, P.U.R.1927C, 545, are excessive and asks that this Commission review the facts and fix just and equitable rates.

It was anticipated that the rates, as set forth in Decision No. 17830, *supra*, would return to the corporation approximately 7.8 per cent of its gas department capital investment. During 1927, due to the unforeseen increase in the sales of natural gas, arising from a complexity of causes, it became apparent that the corporation's earnings would greatly exceed the 7.8 per cent return expected in Decision No. 17830, *supra*. Subsequent studies show the rate of return for the year 1927 to have been not less than 9.13 per cent. This unexpected increase in earning capacity, immediately following the introduction of straight natural gas service, forms the basis of the complaint filed by the city of Los Angeles and the subsequent investigation on the part of the Commission.

Since investigation in connection with the above complaint can not reasonably be limited to gas service of Los Angeles Gas & Electric Corporation within the city of Los Angeles, but involves, as well, service rendered to the balance of the territory served by that corporation and to similar service rendered by Southern California Gas Company within Los Angeles, the Commission

instituted proceedings to make the necessary investigation sufficiently broad.

For convenience, these matters were consolidated for hearing with those proceedings which involve gas rates charged by Southern Counties Gas Company, particularly in its western and southern districts, where temporary rates were established by Decision No. 18009 and Decision No. 18310, respectively.

Public hearings were held in Los Angeles and the matters were submitted for decision June 5, 1928. Evidence taken involved the gas operations of Los Angeles Gas & Electric Corporation only, Southern California Gas Company having stipulated that its case be consolidated with that of Los Angeles Gas & Electric Corporation. No cause appearing for change in the rates of Southern Counties Gas Company which are here involved, the order will provide for dismissal of the proceedings relating to that company.

The discussion which followed deals with the gas department of Los Angeles Gas & Electric Corporation and the order establishes rate schedules for that corporation and for Southern California Gas Company.

For complete description of the gas properties of the companies here involved, reference is made to the decisions enumerated above. Attention is called to the subsequent purchase and operation by Southern California Gas Company of the properties of Midway Gas Company.

Rate base.

The corporation submitted an estimate of gas department fixed capital, amounting to $55,883,351.64, as of January 1, 1928. With the exception of three parcels of land, this estimate is based on the finding of this Commission in its Decision No. 17830, *supra*. The three parcels of land in question are estimated by D. F. McGarry to have increased in value by $318,574, the gas department proportion of this increase being $256,984.37. The testimony relating to this alleged increase in land value for these certain parcels was neither complete nor conclusive, as it was apparent that the real estate market was generally inactive and that there might reasonably be a decline in the value of other

parcels of land which had not been considered. For the purpose of this proceeding only, we will allow as gas department proportion $140,000 of the claimed increase in value testified to by applicants' witness.

The estimates of net additions and betterments for the year 1928 varied between $2,046,000 and $2,292,073. However, for purposes of this decision, the estimate of $2,292,073, as made by the corporation, will be accepted. One-half of this amount be added to fixed capital as of January 1, 1928, to obtain the average fixed capital operative throughout the year 1928.

The various estimates of necessary materials and supplies and working cash capital submitted are substantially in agreement, when consideration is given to moneys on hand for state tax payments. An allowance of $1,800,000 will be made for these items.

[1] Consumers' advances in aid of construction were estimated at $705,000 by the corporation and, as this amount is available to the corporation without payment of interest, it will be treated as a proper deduction in determining the rate base.

Table No. I., below, shows 1928 average rate base:

Table No. I.

Rate Base, 1928, Los Angeles Gas & Electric Corporation, Gas Department.	
Fixed capital, January 1, 1928	$55,626,367
One-half estimated net additions and betterments, 1928	1,146,037
Average fixed capital, 1928	$56,772,404
Allowance for increased land value	140,000
Working cash capital and material and supplies	1,800,000
Sub-total	$58,712,404
Construction advances (deduct)	705,000
Rate base, year 1928	$58,007,404

Mr. Ralph U. Fitting testified for the corporation as to reproduction value, deduction to determine present value, and going value. In view of those considerations which were developed in cross-examination of this witness, namely:

1. Failure to reflect downward trend of prices since the period upon which witness has based his calculation,

2. Omission of any reflection of depreciation and obsolescence,

3. That certain elements claimed as value have been paid by

consumers through rates or advances carrying no interest charges, we can not but conclude that witness' claimed value when properly modified is but slightly, if at all, higher than the rate base herein used.

Revenue.

Estimates of gross revenue from gas operations for the year 1928 were submitted by witnesses for the corporation, the city of Los Angeles and the Commission's engineering department. As will be seen from an examination of these estimates, as given below, the basis of determination and the amounts estimated vary greatly.

Table No. II.

Estimates of Revenue from Sale of Gas for Year 1928.

	Domestic and commercial	Industrial	Total
Los Angeles Gas & Electric Corporation:			
Based on 20-year average mean monthly temperatures	$13,959,886	$344,965	$14,304,851
Based on sales trend per consumer for period 1922–27, inclusive	13,418,232	344,965	13,763,197
Actual for January, February, and 27 days of March, 1928. Balance of year based on 20-year average mean monthly temperatures	13,736,397	344,965	14,081,362
Actual for January, February, and 27 days of March, 1928. Balance of year based on sales trend for period 1922–27	13,430,124	344,965	13,775,089
City of Los Angeles:			
Based on 50-year average mean monthly temperatures	14,840,813	303,237	15,144,050
Engineering Department California Railroad Commission:			
Based on sales trend per consumer for 1921–26 and 1927 with adjustments	13,715,448	306,000	14,021,448
Based on 50-year average mean monthly temperatures with units sales on basis of sales 1924–27, inclusive	14,457,516	275,222	14,732,738
Based on 50-year average mean monthly temperatures with unit sales on basis of 1927 sales	15,176,538	275,222	15,451,760

It is evident from the above estimates that the temperature conditions assumed as the basis of the estimates, or temperatures which existed during a period upon which an estimate was based, very materially affect the results obtained. Further complication enters because of lack of agreement between engineers as to the proper percentage of unaccounted for gas to be expected with a

natural gas distribution system after such system has reached a condition of stability. Differences of opinion also exist as to the comparative efficiency of use of natural as compared to mixed gas.

The problem before us devolves primarily upon a determination of what temperature conditions can reasonably be assumed for the next few years, during which the rates herein established will apply. Consideration must also be given to the relative efficiency of use of natural gas as compared to mixed gas with consumers' appliances adjusted for the respective kind of gas served.

In view of the evidence submitted, we feel that the "20-year average mean temperatures" (or the average of temperatures which were experienced during the period 1908 to 1927, inclusive), as advanced by the corporation, are extremely conservative, but, for purposes of this decision only, may be accepted as the temperature conditions to be expected on the average during the next few years. Therefore, the calculation of sales, based on these temperatures, which was presented by the corporation, with certain exceptions, will be used in the present proceedings. These exceptions are based on additional operating data for the period immediately subsequent to the preparation of the corporation's exhibit.

Mr. Masser, testifying for the corporation, estimated the 1928 domestic and commercial gas sales to be 15,424,020 Mcf., under 20-year average temperature conditions, with a corresponding revenue of $13,959,886. Subsequently, this witness revised his estimate of the number of independent active meters by months, which revised estimate, when applied to the basic figures, results in a reduction of the estimate of domestic and commercial gas sales to 15,366,120 Mcf., and a consequent reduction in the estimated revenue to $13,907,062. In arriving at his estimates, he adds 2 per cent of sales calculated on the former mixed gas basis, to allow for the estimated lower efficiency of use during the next few years of natural gas over that of mixed gas.

Column 1 of the following table shows Mr. Masser's estimate of the percentage increase in sales of natural gas, as compared to mixed gas for the same temperature conditions. The downward

trend was explained by him to represent the effect of the decreasing percentage of appliances remaining to be adjusted. He stated that adjustment of appliances would be completed about August 1, 1928, from which date he estimated that natural gas sales would continue 2 per cent greater on a heating value basis than would be the case if mixed gas were served. Opposite his estimated figures, upon which he bases his final conclusion, are shown the actual percentages for these same months, based on operating data subsequently available and calculated in accordance with the methods set forth in the corporation exhibit.

Year 1928	Mr. Masser's estimate	Actual
January	4.40 per cent	3.10 per cent
February	3.90	5.64
March	3.45	9.34
April	3.00	—2.15
May	2.60	14.18
June	2.25	11.87
July	2.00	16.77

Based on the above, we conclude that the corporation's estimate of the future inefficiency percentage is low and that a 4 per cent allowance for this item is reasonable. Making this correction, we obtain a revised domestic and commercial sales estimate of 15,667,416 Mcf. and a corresponding revenue of approximately $14,180,000.

The corporation estimated industrial gas sales at $344,965, which is somewhat in excess of the estimates of the city and Commission, and other miscellaneous operative revenues at $109,000. This gives a total estimated revenue of $14,633,965 which, under the record before us, may reasonably be expected to obtain under existing rates for the year 1928, assuming temperature conditions to be as accepted above.

Operating expense.

The main item of operating expense is the purchase of natural gas, this being roughly proportional to sales. Testimony indicates a reasonable estimated unit cost for 1927 of 17.99 cents per Mcf., delivered to this utility's transmission lines. The domestic and commercial sales herein found reasonable are 15,667,416 Mcf., unaccounted for gas being according to testimony 14.6 per cent of sendout, or a total domestic and commercial send-

out, on the above basis, of 18,345,904 Mcf. We will use as reasonable for industrial sendout 1,925,000 Mcf., transmission losses of 175,000 Mcf., and a deduction of 90,000 Mcf. from the total calculated sendout because of oil gas that, under extremely cold weather conditions, might be manufactured for peak or emergency use. This gives a total gas purchase of 20,355,904 Mcf. at 17.99 cents, or a total expense for this item of $3,662,027.

Estimates of operating expenses, exclusive of taxes, depreciation, and gas purchase expense, vary from $3,091,450 to $3,519,270, the higher figure being that submitted by the corporation. While this latter estimate reflects certain exceptional maintenance and operating conditions which should not recur in the following years, it is not greatly in excess of what this Commission feels should reasonably be expended as a total to maintain a high degree of service. The total will, accordingly, be accepted without passing upon the reasonableness of any specific item of expense.

Gross operative revenue for 1927, less uncollectibles and revenue from company use, was $14,451,239. State tax is taken as 7½ per cent of this amount, or a total of $1,083,843. Federal income tax is based on the net revenue before Federal tax, less allowable deductibles of $2,295,056, as shown in corporation Exhibit 31, upon which taxable revenue the present rate of 13½ per cent is applied. Other operative taxes total $50,500.

Depreciation annuity.

The corporation estimated the necessary depreciation annuity for the year 1928 to be $1,122,478. After deduction of $30,386, which the corporation included in addition to the normal depreciation annuity, this estimate is substantially in agreement with other estimates presented.

The $30,386 noted above was claimed by the corporation as being necessary to amortize the undepreciated balance that will remain in certain production accounts, due to the expected retirement, in 1932, of several gas generators and accessory equipment. It is estimated that this equipment will have to be replaced at that time, due to the increase of peak loads beyond the capacity of the equipment in question. If this takes place,

it will result in the removal from service of certain property before it has served its estimated useful life.

[2] However, while depreciation annuity is calculated on the basis of the expected life spans of the countless items going to make up the complete property, it should be treated as a whole and consideration should, therefore, not be given to the chance variation from the average of any particular class of equipment or single item. Considered as a whole, the estimated lives are conservative and we do not feel that the inclusion of $30,386, over and above the depreciation annuity based on those lives, to be warranted. The amount of $1,092,092, which remains after deducting the $30,386, will be accepted for purposes of this decision.

Rate of Return.

[3] Based upon the above findings, it is possible to calculate the rate of return to be expected for the next few years if rates now in effect are left undisturbed. Such calculation is set forth in the following table:

Table No. III.

Estimated Rate of Return, Los Angeles Gas & Electric Corporation, Gas Department, Based on Estimate of Number of Consumers during 1928.

Estimated gross revenue	$14,633,965
Gas purchased	3,662,027
Other operating expense	3,519,270
State tax	1,083,843
Miscellaneous tax	50,500
Sub-total	$8,315,640
Depreciation	1,092,092
Sub-total	$9,407,732
Federal income tax	395,709
Total	$9,803,441
Net for return	4,830,524
Rate of return (rate base $58,007,404)	8.33%

It is apparent that a return of 8.33 per cent is excessive.

In view of the marked decline in the cost of money to large utilities during the past few years, this Commission has held, in a number of instances, that a return of 7½ per cent upon capital invested is reasonable for the larger utilities operating in California. This particular utility being a distributing agent, and incurring no exceptional hazard, we can find no justifica-

tion for granting a return in excess of 7½ per cent, and, therefore, conclude that such a return is reasonable.

It is apparent from the fact that gas sales and revenue fluctuate in accordance with variations in temperature, that the rate of return for any one year may be either above or below what is considered adequate. This is particularly true for the area involved in this proceeding, where heating sales have developed under comparatively low rates which have been possible because of large supplies of natural gas available. Recognizing this fact, and giving consideration to the past few years of somewhat higher than normal temperatures, we will fix rates that will yield slightly in excess of 7½ per cent over a long period of years, and which can safely be relied upon to give 7½ per cent return during the next two or three years.

Rates.

The fixing of rates in this procedure involves not only the total revenues to be produced but form of rate, differentials between rate areas, and the boundaries of these areas as well.

All interested parties have agreed on a minimum charge form of rate, such minimum to include a small quantity of gas, with a constant commodity price for use in excess of the minimum allowance. These parties have suggested a uniform charge of 80 cents for the first 300 cubic feet per meter per month in all districts. There are certain advantages to this form of rate, such as the lower commodity charge, which results in view of the increased minimum. We are satisfied that such a rate more nearly approximates the cost of service and will ultimately result to the benefit of the entire group of consumers.

As a result of studies made, we conclude that there should be but two rate areas; the first area to consist of the present first and second rate areas, and the second to consist of the present third rate area and that, together with a general reduction of rates, there should be a material reduction in the rate differential of the two areas. The rates herein established will so provide.

This decision is based upon the maintenance of a straight natural gas service of approximately 1100 B.T.U. per cubic foot, and the order will provide for that character of service.

It is apparent from the discussion above that gross revenues will fluctuate considerably from year to year, depending upon weather conditions, with a resulting marked effect upon yearly net revenue available for return. It would seem that the most effective method of stabilizing net revenues so that a fairly uniform return might be earned through a period of years of varying weather conditions, would be by means of a reserve set up for this purpose, similar to the contingency reserve made effective some years ago on the Southern California Edison electric system for the purpose of minimizing the yearly variations in water conditions and hence in steam generation fuel cost.

Such a step can not be taken without co-operation from the utility involved, and we, therefore, suggest that these utilities give serious thought to the establishment of reserves impounding excessive yearly revenues in years of low temperature conditions, and from which withdrawals could be made in years of high temperature conditions with consequent lower revenue.

IOWA SUPREME COURT.

CENTRAL STATES ELECTRIC COMPANY

v.

POCAHONTAS COUNTY et al.

[No. 38740.]

(— Iowa, —, 223 N. W. 236.)

Highways — Jurisdiction of Highway Commission — Primary rules.

1. The powers and duties of the former board of supervisors with respect to the construction and maintenance of primary roads has been by law transferred to the State Highway Commission, p. 19.

Electricity — Transmission lines — Application — County engineer.

2. A requirement of statute that an application for the construction of a transmission line be filed with the county auditor was held to have the manifest purpose of invoking the action of the county engineer, who could not be required to act relative to the location until such application was filed, p. 22.

Electricity — Application for transmission line — Action of county engineer.

3. The filing of a written application for the construction of a

transmission line with the county auditor as required by statute to invoke action of the county engineer is useless, where that officer has already acted in the premises without the filing of such document, p. 22.

Electricity — Transmission line construction — Approval of engineer.

4. County authorities cannot complain because an electric company contemplating a transmission line has not made a written application for a designation of location, where its engineer voluntarily designated such location without written application being made, p. 23.

Highways — Transmission line construction.

5. The primary purpose of a highway is for travel and transportation, and its use by a public utility company is subordinate and subservient to its use by the public for the primary purpose, p. 24.

Commissions — Authority over a transmission line — Local authority.

6. Although the Board of Railway Commissioners has been given by law the right to say whether a proposed transmission line may be constructed, it is not the intention of the legislature to give such body the absolute authority to locate the whole line, including superstructure in the highway, in view of other provisions delegating such authority to local officials, p. 25.

Electricity — Transmission line — Procedure.

Discussion as to the effect of proper procedure in applying for authority for electrical transmission line, p. 26.

(ALBERT, C.J., and FAVILLE, J., dissent.)

[January 23, 1929.]

APPEAL from decree denying injunction restraining the defendants from interfering with the plaintiff, an electric company, in the construction of a high voltage transmission line along a road and granting injunction, on cross petition, to restrain the company from constructing or maintaining the transmission line, except along a line and at points designated and located by the county engineer; decree affirmed.

Appearances: John A. Reed, C. E. Richmann, and C. J. Lynch, all of Cedar Rapids, for appellant; John Fletcher, Attorney General, Maxwell A. O'Brien, Assistant Attorney General, W. W. Harris, County Attorney, and J. M. Berry, both of Pocahontas, for appellees.

Wagner, J.: On January 12, 1927, the plaintiff, a public utilities company, was granted by the Board of Railroad Commissioners of this state a franchise to erect, maintain, and

operate a 13,200-volt line for the transmission, distribution, use, and sale of electric current outside of cities and towns, and for such purpose to erect, use, and maintain poles, wires, guy wires, towers, cables, conduits, and other fixtures and appliances necessary for conducting electric current for light, heat, and power over, along, and across any public lands, highways, streams, or the lands of any person, company, or corporation, and to acquire necessary interest in real estate for such purposes, on and along the route particularly described, to-wit: (Here follows lengthy description of the route, which in substance states that it begins at the southwest corner of § 22, township 93 north, range 35 west of the Fifth P. M., in Buena Vista county, thence on the highway in an easterly direction to approximately the northeast corner of the northwest quarter of § 5, township 92 north, range 31 west of the 5th P. M., in Pocahontas county.)

There is involved in this litigation only the rights of the plaintiff in the erection of a line over that portion of the route which is located in Pocahontas county. The preliminary steps taken by the plaintiff prior to the granting of the franchise were in exact accord with the requirements of Chap. 383 of the 1924 Code. The petition asking for the franchise was in due and legal form. It contained the general specifications as to the materials to be used and manner of construction of said line. As to cross-arms, the specifications provided for wooden cross-arms 4 by 5 inches and 8 feet in length. The route is over primary road No. 10, which is 66 feet wide, except 1 mile thereof, different portions of which mile are 66 feet, 60 feet, and 55 feet in width.

The plaintiff did not, as provided for by § 4838 of the Code of 1924, file written application with the county auditor of Pocahontas county, asking for the location of said line in said county by the county engineer. One of the plaintiff's engineers orally inquired of the county engineer of Pocahontas county as to the location required for the line, and was informed that the requirement was that the poles be set so that the center thereof would be within 1 foot of the fence line or the outside limit of the highway. No designation was made as to which

side of the highway the line should be located. Thereafter, without any knowledge of the county engineer, the plaintiff, by a force of about 50 workmen, erected the poles for said line, the most of which are 4 feet from the fence line, but some of them are much farther out in the highway, and some of them somewhat closer to and a few even outside of the highway boundary.

A written notice, in accordance with the provisions of §§ 4835 and 4836 of the Code of 1924, was served upon plaintiff, requiring it to remove all poles previously set by it which were at a greater distance than 1 foot from the boundary line of the highway. The plaintiff then began this action, and it asks in its petition that the defendants be enjoined from interfering with or attempting to remove or relocate its transmission line as now located, and from taking any proceedings pursuant to the aforesaid notice.

The defendants pray that plaintiff's petition be dismissed, and that the defendant county and the board of supervisors thereof may have judgment and decree enjoining and restraining the plaintiff from maintaining its line and poles in the highway at a greater distance from the outside boundary thereof than 1 foot, and that it be enjoined from maintaining any transmission line or line of poles upon said highway, unless placed therein on such line or lines and at such location as may be designated by the county engineer or the board of supervisors.

Upon trial, the plaintiff's petition was on May 27, 1927, dismissed and a decree rendered enjoining the plaintiff from maintaining its transmission line and line of poles in said primary road No. 10 at the place, or places, as now located, and enjoining and ordering the plaintiff to remove its transmission and pole line to such location on said highway (should the plaintiff still desire to maintain this line in said highway) as may be designated by the county engineer of Pocahontas county, said removal and relocation to be made by the plaintiff within thirty days from and after the filing of the county engineer with the county auditor a designation of the location of said line and poles upon said highway; and that upon fail-

ure of the plaintiff to so remove its said line of poles and to relocate the same upon the line designated by the county engineer, within thirty days after the filing of said designated location by said county engineer, then the board of supervisors of said county is empowered to clear the highway thereof.

In conformity to said decree, the county engineer filed with the auditor designation of the location of said line, stating therein: "The center line of said pole line to be placed in the highway at a distance not to exceed 1 foot from the right of way line. Further, that upon 48-hours' notice to the county engineer of the company's intention to start construction, actual stakes will be placed by said engineer at all highway alignment points along the line of above designated location."

It is shown by the record that the width of the crown of present-day construction of primary roads is 30 feet, and that the maintenance of the line of poles as placed by the plaintiff company will be detrimental to the construction, maintenance, upkeep, and drainage of said highway.

It is the contention of the plaintiff that it has the right to maintain its line of poles 4 feet from the boundary line of the highway, so that no portion thereof, by reason of the 8-foot cross-arm, will extend beyond the limit of the highway.

The defendants contend that the plaintiff has no rights under its franchise, because it filed no written application with the county auditor for the location of the line by the county engineer, and because of their claims that there has been no location of the line by that officer. And they further contend that the county engineer has the right to designate and locate the line of poles for said line upon the highway at the boundary line of the highway, or not further remote than one foot therefrom, as designated by said engineer, in compliance with the decree.

The propositions thus submitted by the respective parties have not been heretofore passed upon by this court. We will set out or refer to the statutes relied upon by the respective parties.

Section 8309 provides: "No individual, company, or cor-

poration shall erect, maintain or operate any transmission line, wire, or cable along, over or across any public highway or grounds outside of cities and towns for the transmission, distribution, or sale of electric current, without first procuring from the Board of Railroad Commissioners, or from the board of supervisors in the county or each of the respective counties in which such transmission line is to be constructed or operated, a franchise granting authority so to do."

Section 8310 provides for the filing of a petition for the franchise desired.

Section 8311 sets forth what the petition must contain, and provides: "The petition shall set forth: . . . 3. The starting points, routes, and termini of the proposed lines, accompanied with a map or plat showing such details. . . . 5. General specifications as to materials and manner of construction."

Section 8312 provides for the giving of notice for the hearing upon the petition.

It is provided by § 8313 for the filing of objections and that the Board of Railroad Commissioners may examine the proposed route, or cause any engineer selected by it to do so. Said section further provides that said board shall consider said petition and any objections filed thereto, and may hear such testimony as may aid it in determining the propriety of granting such franchise, and that it may grant such franchise in whole or in part, upon such terms, conditions, and restrictions and with such modifications as to location and route as may seem to it just and proper.

Section 8319 contains the provision: "Any person, company, or corporation obtaining a franchise as in this chapter provided, or owning or operating under one, shall be conclusively held to an acceptance of the provisions thereof and of all laws relating to the regulation, supervision, or control thereof which are now in force or which may be hereafter enacted, and to have consented to such reasonable regulation as the Commission may, from time to time, prescribe."

Section 8322 gives the person, company, or corporation which has secured a franchise the right of eminent domain to

such extent as may be necessary to obtain right of way for the purpose of carrying out the provisions of the franchise.

"Such franchise shall be subject to such regulations and restrictions as the general assembly from time to time may prescribe, and to such rules, not inconsistent with statutes, as the Board of Railroad Commissioners may establish from time to time." See § 8314, Code 1924.

"The Board of Railroad Commissioners shall have power of supervision over the construction of said transmission line and over its future operation and maintenance. Said transmission line shall be constructed near and parallel to the right of way of the railways of the state or along the division lines of the lands, according to the government survey thereof, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant thereof." Section 8325 of the Code.

"The Board of Railroad Commissioners shall have power to make and enforce such further and additional rules relating to location, construction, operation, and maintenance of said transmission line as may be reasonable." Section 8328 of the Code.

It is provided by § 4560 of the Code that the board of supervisors shall have general supervision of the roads in the county, and to see that the laws in relation to them are carried into effect. "The board of supervisors and township trustees shall cause all obstructions in highways under their jurisdiction, to be removed." Section 4834 of the Code.

[1] On July 4, 1927, since the time of the institution of this litigation, our law with reference to the improvement of primary roads took effect, and the powers and duties of the board of supervisors with respect to the construction and maintenance of primary roads are thereby transferred to the State Highway Commission. See § 4755b36, Code 1927.

Sections 4835, 4836, and 4837 of the Code provide for the removal of fences and poles used for telephone, telegraph, or other transmission purposes to such line on the highway as the county engineer may designate.

Section 4838, which is the chief bone of contention between the parties, reads as follows:

"*New Lines.* New lines, or parts of lines hereafter constructed, shall be located by the county engineer upon written application filed with the county auditor and shall thereafter be removable according to the provisions of this chapter. If there be no county engineer, the Board of Supervisors shall designate said location."

In view of the foregoing statutory law, the question for our determination is, What are the rights of the appellant under the franchise granted? A franchise is a special privilege granted by the state to individuals, companies or corporations, which does not belong to the citizens generally, of common right. 26 C. J. 1008.

"The grantor (of a franchise) is always the sovereign power, whether the grant is made directly or through a delegated agency." 26 C. J. 1024.

"Since in the United States, the people have succeeded to all the rights and privileges of the crown, the legislature has the power to grant franchises, but this power can be delegated to other agencies, such as various boards, courts, municipal corporations or other local authorities." 26 C. J. 1024, 1025, and 1026.

"The grant of a franchise is always subject to regulation and control in the proper exercise of the police power, either by the state or the local authorities." 26 C. J. 1036.

"Franchises are not always granted absolutely, but are sometimes made dependent upon a contingency or condition precedent, as the acquisition of a further consent or license." 26 C. J. 1028.

The original enactment of what is now included in § 4834 to and including § 4838 of the Code is found in § 18, chap. 122, of the Laws of the 35th G. A.; § 1527s17, Supplement to the Code 1913. Said section reads as follows:

"County and township boards, charged with the duty of improving public highways, shall have power to remove all obstructions in the highways under their jurisdiction, but fences and poles used for telephone, telegraph, or other transmission

purposes, shall not be removed until notice, in writing, of not less than ten days has been given to the owner, occupant, or agent of the land enclosed in part by such fence or to the owner or company operating such lines. The notice to any owner or operator of any such telephone, telegraph, or transmission line may be served on any agent or officer of such line, and all such fences and poles shall, within the time designated, be removed to such line on the highway, and as designated by the engineer, and if not removed by the date fixed in such notice, same may be forthwith removed by the proper officials. Any new lines, or parts of lines hereafter constructed, shall be located by the engineer, *and shall be removable according to the provisions of this section.*" (The italics are ours.) This section became effective April 9, 1913.

Chapter 383 of the Code, including § 8309 et seq., hereinbefore quoted or referred to, was in the main first enacted by the same General Assembly, and is found in chapter 174 of the Laws of the 35th G. A. §§ 2120n to 2120t, inclusive, Supplement to the Code 1913. It became effective April 16, 1913. It is provided by said enactment: "Any transmission line proceeding under this act and obtaining the franchise herein provided shall be conclusively held to an acceptance of the provisions of this act and of all acts or laws relating to public utilities or to the regulation, supervision, or control thereof which are now in force or which may be hereafter enacted, and to have consented to such reasonable regulation as the Commission may, from time to time, prescribe." Section 3, Chap. 174, 35th G. A. Laws; § 2120p, Supplement to Code 1913. This provision, without any change in meaning although a slight change in verbiage, is now found in § 8319 of the present code hereinbefore quoted. By this section and the original enactment, any person, company, or corporation obtaining a franchise is conclusively held to an acceptance of the statutory law in force, which includes § 18, Chap. 122, of the Laws of the 35th G. A. now §§ 4834 to 4838 of the present code. While the statutory law with reference to the location by the county engineer of telephone, telegraph, and transmission lines was first enacted by the 35th G. A. and provides: "Any

new lines, or parts of lines hereinafter constructed, shall be located by the engineer." See § 1527s17, Supplement to Code 1913. Said section was amended by Chap. 410, 37th G. A., by adding after the words hereinbefore quoted "upon written application filed with the county auditor." Said statute as amended is now § 4838 of the code hereinbefore quoted.

[2, 3] Manifestly, the requirement of the filing with the county auditor of a written application for the location of the line is to invoke the action of the county engineer. The county engineer could not be required to act relative to the location or designation of the line until the written application was filed with the county auditor, but if that officer acted in the premises without the filing of a written application, then the filing of same with the county auditor would be useless. If the appellant had erected its line at the place orally designated by the county engineer, it could not be successfully asserted that the erection of the line was without authority of law for the mere failure on the part of the appellant to file a written application with the county auditor. The written designation filed by the county engineer with the county auditor, in compliance with the decree rendered by the trial court, is identical as to the side of the road and location of the line with that erected by the appellant, except that it designates that the center line of said pole line is to be placed in the highway at a distance not to exceed 1 foot from the right of way line. It is thus manifest that, had the line been erected at the place orally designated by the county engineer, the appellees would have no just ground for complaint.

One of the representatives of the appellant company testified:

"Before locating that line I saw the county engineer of Pocahontas county in reference to its location, and obtained from him a direction as to such location. He gave me a certain distance from the center line of the highway to follow. That direction was within one foot of the property line." "In my conversations with Mr. Thornton, the county engineer, he told me that I would be required to set the poles out to within one foot of the fence line."

The county engineer's testimony is as follows:

"Q. Now Mr. Thornton, at any time did this company ever make any request of you to designate a line, or did you at any time designate to Mr. Lilly, or any other officer of the plaintiff company, a line on which to set these poles? A. There was no request made for a designation, but I voluntarily designated a line.

"Q. Where? A. A line not closer to the center line than one foot in from the right of way line.

"Q. That was with reference to the distance of setting the poles out from the fence? A. Correct."

He further testified:

"I then voluntarily designated the line that Pocahontas county gave for poles lines. Mr. Lilly stated that their company did not follow that line, which was 32 feet from the center line, but that his company used the 29-foot line. I stated that we would not allow the 29-foot line to be constructed. Mr. Lilly said that they would not use the 32-foot line; that he had his instructions from his company and that he had to follow the instructions. I then advised Mr. Lilly that if his company started construction on the 29-foot line, they would be enjoined from proceeding."

He further testified:

"The only objection that I, as county engineer of Pocahontas county, have to this transmission line as now located, is the fact that it is not located either at or within one foot of the road limits."

It is thus manifest that the appellees' sole complaint is that the appellant company did not locate its line of poles at the place designated by the county engineer, and, the county engineer having acted and designated the location of said line without the filing with the county auditor of a written application therefor, the purpose of said written application has been served. It is a well-recognized principle in equity that it does not require the doing of useless things.

[4] We, therefore, hold that, before the county engineer was required, or could be compelled, to designate the location of the "line," the statutory law required appellant's written ap-

plication therefor to be filed with the county auditor; but, since the engineer acted and did designate said location without said written application, the purpose of the law has been complied with, and the appellees cannot complain because no written application for the location of the line was filed with the county auditor.

Now, what as to the further contention of the appellees that the county engineer has the right to designate and locate the line of poles for said line upon the highway at the boundary line of the highway, or not further remote than 1 foot therefrom, as designated by said engineer? Since the appellant, by the provisions of § 8319, is conclusively held to an acceptance of the provisions of the law contained in § 4838, the question arises as to what was the intent of the legislature in the enactment of the latter section. By reverting to the original enactment in § 18 of the 35th G. A. Laws hereinbefore quoted, the intent is apparent. It provides for the removal of obstructions in the highway and specifically refers to the removal of poles used for telephone, telegraph, or other transmission purposes. It provides as to how the notice shall be served upon the owner or operator of any such telephone, telegraph, or transmission line, and that the poles of said line shall, within the time designated, be removed to such line on the highway as designated by the engineer, and, if not removed by the date fixed in the notice, the same may be forthwith removed by the public authorities. It then provides: "Any new lines, or parts of lines hereinafter constructed, shall be located by the engineer, and *shall be removable according to the provisions of this section.*" (The italics are ours.)

It is obvious that the word "lines," designating therein what shall be located by the county engineer and what may be removable, has reference to what are mentioned in the preceding portion of said section, to-wit, "poles used for telephone, telegraph or other transmission purposes," which by their location in certain portions of the highway might constitute obstructions.

[5] The primary purpose of a highway is for travel and transportation, and its use by a public utilities company is subordinate and subservient to its use by the public for the pri-

mary purpose. Ganz v. Ohio Postal Teleg. Cable Co. 72 C. C. A. 186, 140 Fed. 692; Little v. Central District & Printing Teleg. Co. 213 Pa. 229, 62 Atl. 848; Inter-State Independent Teleph. & Teleg. Co. v. Towanda, 221 Ill. 299, 77 N. E. 456; American Teleg. & Teleph. Co. v. Millcreek, 195 Pa. 643, 46 Atl. 140; Brownwood v. Brown Teleg. & Teleph. Co. 106 Tex. 114, 157 S. W. 1163.

We have held that the public highway from side to side, and from end to end, is for the use of the public. Lacy v. Oskaloosa, 143 Iowa, 704, 121 N. W. 542, 31 L.R.A.(N.S.) 853; Quinn v. Baage, 138 Iowa, 426, 114 N. W. 205; Perry v. Castner, 124 Iowa, 386, 100 N. W. 84, 66 L.R.A. 160, 2 Ann. Cas. 363.

It is an established principle of construction of statutes that grants thereby made to public utilities companies of rights belonging to the state, or to the public, are to be construed most strongly in favor of the public and against the company. In Re Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152. Where the statutes are susceptible of two meanings, that construction is to be adopted which works the least harm to the state. Chenango Bridge Co. v. Binghampton Bridge Co. 3 Wall. 51, 18 L. ed. 137.

[6] From the foregoing, it is quite clear that, under § 4838, the power is delegated to the county engineer, or if there be no such officer, then to the board of supervisors, to designate the places upon the public highways where the poles supporting the wires may be erected. While the legislature, by § 8309 of the Code, has given the Board of Railroad Commissioners, as well as the board of supervisors, the right to say whether a line may be constructed, it it apparent that it has, by § 4838 of the Code, which the company, by § 8319 is conclusively held to have accepted as governing the location of the line, delegated the right to designate the place of construction of the line of poles in the highway only to the local officers. Section 8325 is another provision which, under § 8319, the company is conclusively held to have accepted as governing the location of the "line." Under its provisions, after the franchise is granted, the line shall be constructed near and parallel to the right of

way of the railways of the state, or along the division lines of the lands, according to the government survey thereof, wherever the same is practicable and reasonable, *and so as not to interfere with the use by the public of the highways of the state.* (The italics are ours.) This statute is indicative that it was not the legislative intent to give the Board of Railroad Commissioners the absolute authority to locate the whole line, including superstructure, in the highway.

The purport and intent of all of the statutes under consideration, taken and construed together, is to leave to the board of supervisors or Board of Railroad Commissioners the right to determine whether a line may be constructed, and to determine the general course, direction, and termini of the proposed line, but it is left to the local officers to determine and designate the particular location of the line of poles in the highway. By this construction, there is no conflict in the statutes.

Under this construction of the statutes, if appellant erect its line with a crossbar 8 feet in length, extending equidistant on each side from the poles, a portion of the construction will be over the adjoining land, but the statute, § 8332 of the Code, as well as its franchise, gives it the right of eminent domain.

The decree of the trial court is correct, and the same is hereby affirmed.

Evans and Morling, JJ., concur; Stevens, Kindig, and DeGraff, JJ., specially concurring.

Kindig, J. (specially concurring): I concur in the result reached by the majority, but only on the theory that the utility company did not properly demand, in writing, that the engineer locate the "transmission line."

While it is true there was some talk between a representative of the appellant and the highway engineer in reference to the location of the highline, yet there was no demand for such location, as contemplated by statute. At this juncture, the engineer's testimony is as follows:

"Q. Now, Mr. Thornton, at any time did this company ever make any request of you to designate a line, or did you at any

time designate to Mr. Lilly, or any other officer of the plaintiff company, a line on which to set these poles? A. There was no request made for a designation, but I voluntarily designated a line."

That "location" was made by the engineer, not in compliance with the statute, but as a voluntary act. Such action on the engineer's part appears to have been done without special request therefor, and, so far as disclosed, that officer possessed no knowledge that the franchise had been granted. So, it is not shown that the "location" was designated by the engineer with the intention of placing the line under the franchise permitted by the State Railway Commissioners.

However, I am compelled to disagree with the discussion used by the majority in reaching their conclusion. These Railway Commissioners had a right to grant the franchise. Before making this concession, it is necessary for them to find certain facts, included among which is the determination of whether or not the "transmission line" shall interfere with the public use of the highway. This is a prerequisite to the allowance of the franchise. Manifestly, there is included within this prerogative the right to settle the question regarding the construction of the line being or not being an obstruction upon the public way. See § 8325, Code 1927. When that jurisdiction is exercised by the "Railway Commissioners," the county or highway engineers do not have the statutory right to overrule them and enforce a contrary mandate.

If it were otherwise, such engineers would have, in effect, supervisory powers over the Railway Commissioners. Those engineers must locate the "transmission line" upon the highway (if the Railway Commission has granted a franchise therefor) and not off such thoroughfare, nor can said engineers place the "line," in this event, partly thereon and partly off therefrom. "Transmission line" includes not only the poles, but also the "wires, guy wires, towers, cables, conduits, and other fixtures and appliances necessary for conducting electric current for light, heat, or power." See § 8310, Code 1924.

Moreover, such legislation is not without analogy, because it is similar to other provisions for franchises to place electric

poles and wires on and lay gas, water, and heat mains under streets and alleys in cities, and, operate motorbusses upon the public highways outside of municipalities. No one will seriously argue that city or highway engineers can revoke such franchise or right. Control of this so-called franchise is entirely within the legislative power. Authority to allow or revoke was given by the lawmakers to the Railway Commissioners and city councils—not the highway or city engineers.

Embraced in this case is a matter of statutory construction. By the use of that judicial power, we are not privileged to add to a statute something which it does not contain. It may be the legislation in question is unwise and should never have been enacted. Nevertheless, that is an argument to be addressed to the lawmaking body in order that it may, in turn, exercise its constitutional function, and through that method bring about the change, if any is deemed wise. For the utility company can obtain no exclusive right, and "such franchise shall be subject to such regulations and restrictions as the general assembly from time to time may prescribe." See §§ 8314, 8316, and 8331, of the same Code.

But, in no event should the court legislate under the guise of mere statutory construction. The doctrine adopted by the majority permits the highway engineers to entirely override the Public Commission (the Railway Commissioners), notwithstanding the fact that under the statute that body is given general jurisdiction in the premises. See § 7874, 1927 Code. To put the thought in another way, the conclusion reached by the majority allows the engineer to constitute himself an appellate tribunal with power to reverse the decision of the Railway Commissioners. There is no such right granted by the statute, and, in order to arrive at the ultimate goal reached by the majority, it is necessary, in my opinion, to supply that which the Code provisions do not contain. I believe the legislature alone has the power to thus amend its acts.

Review of the Railway Commission's decision in this regard, if any is to be had, must clearly be through the courts under proper proceedings, rather than by the highway engineers.

De Graff, J., joins in this special concurrence.

Stevens, J. specially concurring. At the time of the submission of this case, I entertained the views expressed by Mr. Justice Kindig in his special concurrence. Upon further reflection and careful consideration of the statute, I find myself in substantial harmony with the views expressed in the opinion of Mr. Justice Wagner. Upon the real merits of the controversy the court is evenly divided. For this reason, I desire to express my own views in somewhat greater detail than they are stated in the opinion. I concur fully in the opinion of Mr. Justice Wagner in so far as the same involves the propositions hereinafter discussed.

Chapters 383 and 248 of the Code must be construed together. This is true for two reasons. First, the power and authority conferred by Chap. 383 to grant franchises to corporations engaged in the business and for the purposes sought by appellant upon the Board of Railroad Commissioners is in all particulars identical with the same power and authority conferred upon boards of supervisors; second, power and authority is conferred upon boards of supervisors to remove obstructions from the highway, and this power has particular reference to transmission lines.

The petition required to be filed by the applicant must be the same whether filed with the Board of Railroad Commissioners or boards of supervisors. The scope of the hearing and the matters to be determined by the respective boards are the same.

Chapter 248 relates to obstructions in the highways. Section 4838, which confers authority upon the engineer or, in case there is none, upon the board of supervisors to locate transmission lines upon the highway, is found in this chapter. Not only is it the duty of boards of supervisors and township trustees to cause all obstructions to be removed from the highways, but it is further provided by § 4837 that:

"All such fences and poles shall, within the time named, be removed to such line on the highway as the county engineer may designate. If there be no county engineer, the board of supervisors shall designate said line.

"If not so removed the public authorities may forthwith remove them."

Thus, it clearly appears that the power conferred upon the county engineers and boards of supervisors is, in the first instance, to locate new lines (§ 4838) and, next, to designate the location to which lines previously constructed shall be removed. The necessity and purpose of the power thus conferred is to preserve the public highway free from obstructions.

As stated, the authority conferred upon the Board of Railroad Commissioners to hear and determine applications for franchises to erect electric transmission lines upon public highways is no greater than that conferred upon boards of supervisors. Section 8314 makes it the duty of the commerce counsel to prepare a blank form of franchise for the Board of Railroad Commissioners and also for boards of supervisors. The only portion of a transmission line that may constitute an obstruction in the highway is the poles to which the crossbar is attached for the purpose of supporting the wires. The word "line" as used in the statute must, I think, necessarily refer to the poles. The power and authority conferred upon the county engineer, and, in his absence, upon the board of supervisors, to designate the location means the location of the poles. This view is strongly emphasized by the fact that authority to locate is confided, in part at least, in one of the boards which is charged with the duty of removing obstructions from the highway. Either the provisions of Chap. 248 giving the county engineer or the board of supervisors authority to locate the line upon the highway have no application to franchises granted by the Board of Railroad Commissioners or else the authority to be exercised is the same in both cases. If it is the same in both cases, then the authority conferred upon boards of supervisors must be harmonized with the duty imposed thereon to maintain the public highway clear of obstructions. The authority conferred by § 4837 upon the county engineer or board of supervisors relative to the removal of obstructions from the highway is greater after the line has been constructed than it is previous thereto, or a clear distinction must be made in the authority conferred.

Why is not the authority of the county engineer or board of supervisors to designate the location before the construction of the line the same as it is to determine the location thereof in case a removal thereof becomes necessary? Suppose that changes wrought in the highway sixty days after a new line has been constructed under a franchise granted by the Board of Railroad Commissioners have caused the line to be an obstruction in the highway, could the same be removed under the authority conferred by § 4837? If not, then it must be because the authority of the Board of Railroad Commissioners is plenary. If it is, then the authority of the county engineer is limited to designating the side of the highway on which the line shall be constructed or at some point in this case within the 58 feet left in the highway. On the other hand, if the authority of the Board of Railroad Commissioners is plenary, no authority whatever may be exercised by the county engineer in this case, as all agree, on the side of the highway on which the line shall be constructed. It seems to me that the provisions of Chap. 248 are as applicable to new as old lines, and that the authority of the county engineer to designate the location is to be exercised with particular reference to the question as to whether the highway will be obstructed. No one will question the authority of the Board of Railroad Commissioners to have provided in its order that the franchise granted should be without prejudice to the location of the poles on the highway by the county engineer. Surely, the board of supervisors, in granting a franchise, would have the authority to provide exactly at what place in the highway the poles might be placed. It would, in fact, be its duty to require them to be located so as not to obstruct the highway. The authority, in my opinion, of the Board of Railroad Commissioners to grant the franchise is in all respects the same as that conferred upon the board of supervisors and that in every instance the location of the poles is to be determined by the county engineer, if there is one, otherwise, by the board of supervisors. The general supervision over the construction of transmission lines and the location thereof, granted by § 8325, has nothing to do with the matters under discussion.

I am authorized to say that Mr. Justice Evans joins me in this special concurrence.

Albert, C. J., dissenting: Being unable to agree with some matters involved in the foregoing opinion, I am led to dissent thereto and state my reasons therefor.

The defendant is an Iowa corporation engaged in the business of generating, transmitting, distributing, and selling electricity for light, heat, and power purposes. It filed a petition with the Board of Railroad Commissioners for a franchise to construct a 13,200-volt transmission line on said highway. The petition, as required by law, was accompanied by certain specifications as to material, manner, and method of construction, which provided, among other things, for an 8-foot cross-arm on the poles for the purpose of carrying wires conducting electrical energy. There is no question as to the regularity of this proceeding which resulted in the granting of the prayer of the petition of the defendant, issuing of a franchise accordingly, which, so far as material, reads as follows:

"This franchise is issued and permission and authority thereunder are hereby granted unto the above named Central States Electric Company to erect, maintain and operate a 33,000 volt line for the transmission, distribution, use, and sale of electric current outside cities and towns, and for such purpose to erect, use and maintain poles, wires, guy wires, towers, cables, conduits, and other fixtures and appliances necessary for conducting electric current for light, heat, and power over, along, and across any . . . highways," along a road particularly described as follows: (Here follows a description of the highway along which this line was to be built and also a designation on which side of the highway the line was to be constructed, the length of the line being approximately twenty miles).

The franchise further provides that it is subject to the provisions, conditions, and requirements of Chap. 383, Code 1924, and by all of the provisions, rules, and regulations of the Board of Railroad Commissioners as now exist or may be hereafter ordered or required and the Board of Railroad Commissioners is to retain jurisdiction and may at any time make such further

orders and regulations as may be necessary and as said Board may authorize by law.

The county engineer orally designated the location of the poles of this line at a point 32 feet from the center of the highway, or 1 foot from the line which marks the boundary between the highway and the adjoining property. The defendant was found constructing, or starting to construct, its line by placing poles at a point 29 feet from the center of said highway, or 4 feet from the line between the highway and the adjoining property, and this action was instituted to enjoin it from so constructing its line; or, in other words, to enjoin it from constructing its pole line in any other place on the highway than 1 foot from the property line.

Some elementary principles in relation to this matter are well-settled. Primarily, the right to establish, regulate, and control highways rests in the state. Equally true, the state has the right to delegate such powers to boards, Commissions, public or municipal corporations. Originally these rights were all delegated to the boards of supervisors of the respective counties of the state. Later the power of the boards of supervisors respecting construction and maintenance of primary roads was vested in the State Highway Commission. Section 8, Chap. 101, 42 G. A.

No one would dispute the proposition that the primary purpose of establishing and maintaining highways is for the benefit of the general traveling public, but whether the highways are those established by direct act of the legislature as they were in the early history of the state, or by bodies or Commissions or corporations authorized so to do by the state, the state yet has a reserve right over the whole subject by which it may enlarge, reduce, or take away any powers thus conferred.

The legislature of this state has seen fit, in the exercise of this right, to grant to telegraph and telephone companies the right to construct their lines upon the highways in this state, and this power has been enlarged to include electric transmission lines. As to the wisdom of this legislation, allowing highly charged electric lines to be constructed upon the highway, we have no concern as that rests within the sound discretion of the legislature. Later the legislature created a Board of Rail-

road Commissioners and conferred upon it the power of determining whether or not high tension transmission lines should be placed upon any of the highways of this state. The Board is given a discretion to determine this question, and their determination is final unless appealed from. See § 7874, Code 1924, where the Board of Railroad Commissioners is given "general supervision of . . . all lines for the transmission, sale, and distribution of electrical current for light, heat, or power, except in cities and towns."

Under § 8309, Code 1924, all such companies are prohibited from erecting, maintaining, or operating any of these lines without first procuring a franchise.

As provided by Chap. 383, Code 1924, they acquire this franchise by the filing of a petition in conformity with §§ 8310 and 8311. Upon the filing of this petition the Railroad Commissioners are required to fix a date and to publish notice to the citizens of each county through which the proposed line or lines will extend.

Section 8313 provides that: "Any person, company, city, town, or corporation whose rights or interests may be affected, shall have the right to file written objections to the proposed improvement or to the granting of such franchise," and, after being fully advised in the matter, the Railroad Commissioners "may grant such franchise in whole or in part upon such terms, conditions, and restrictions, and with such modifications as to location and route as may seem to it just and proper."

It is obvious, therefore, from this enactment of the legislature that the Railroad Commissioners have the power to grant the franchise, specifying the terms, conditions, and restrictions thereof, and designating the location and route of these lines as they may deem just and proper. Any person is given the right to appear before the board on such hearing and file written objections to the proposed improvement or the granting of such franchise. No objections appear to have been made in the instant case, and we, therefore, turn to the requirements of the statute as to what was legally included in this franchise.

Section 8310 says, among other things, that they may petition for "a franchise, to erect, maintain, and operate a line or lines

for the transmission, distribution, use, and sale of electric current outside cities and towns and for such purpose to erect, use, and maintain poles, wires, guy wires, towers, cables, conduits, and other fixtures and appliances necessary for conducting electric current for light, heat, or power over, along, and across any public . . . highways."

It is quite apparent, therefore, from this section of the code, that the franchise covers more than simply the line of poles because it so specifies in terms. It necessarily follows, therefore, that the Board of Railroad Commissioners had the power to grant this franchise for the erection of this transmission line and upon the terms, conditions, restrictions, and limitations therein set out. It also had the power to designate the route and location of this line which it did.

It is provided in § 8313 that the Board of Railroad Commissioners may examine the proposed route or cause an engineer selected by it to do so, and it may grant such franchise in whole or in part upon such terms, conditions, and restrictions, and with such modifications as to the location and route, as may seem to it just and proper, and such franchise, according to § 8314, shall be subject to such rules, not inconsistent with the statute, as the Board of Railroad Commissioners may establish from time to time.

By § 8318 the Board is required to keep a record showing all franchises granted, to whom issued, with a general statement of the location, route, and termini of the line or lines covered thereby.

It is to be noticed that this chapter of the Code, 383, is headed "Electric Transmission Lines," and from a study of all of the sections in this chapter it is apparent that they all purport to deal with electric transmission lines.

Chapter 174, 35th G. A., was approved on April 11, 1913, and published on April 16, 1913. Many of the electric lines in the state were built and operated before 1909 when the board of supervisors were given power to locate these lines.

A State Highway Commission was created by Chap. 122, Acts of the 35th G. A., and § 18 thereof provides, among other things, that the "county and township boards, charged with the duty of

improving public highways, shall have power to remove all obstructions in the highways under their jurisdiction, but fences and poles used for telephone, telegraph, or other transmission purposes, shall not be removed until notice . . . to the owner," etc. It further provided that "any new lines, or parts of lines hereinafter constructed, shall be located by the engineer." This act was approved on April 3, 1913, and published on April 9, 1913.

As between these two acts, it is, therefore, apparent that both of them were passed by the same General Assembly, but the act, conferring the powers upon the Railroad Commissioners was the later expression.

By Chap. 410, Acts of the 37th G. A., the former act with reference to location by the engineer was amended by adding thereto a provision that written application should be filed with the county auditor describing the highways upon which such lines, or parts of lines, were to be constructed, etc.

It might be noted, in passing, that this section of the statute, now appearing as § 4838, Code 1924, is related to §§ 4834, 4835, 4836, and 4837, all of which deal with and refer to transmission lines.

The real contention in this case is whether or not the county engineer had the right to disregard all rights acquired by the Central States Electric Company under its franchise from the Board of Railroad Commissioners, and to locate the poles of this transmission line so that a part of the construction will overhang adjoining land; or can the two statutes be so construed as to reach a harmonious result. If not so, which shall govern?

Much testimony was introduced on both sides relative to the wisdom and expediency of the location of this pole line at the point designated by the county engineer, but as we view the question, this is wholly immaterial. Many of the matters now made the basis of justification for putting this pole line within 1 foot of the fence are matters which should have been raised by objection when the matter was on for hearing before the Board of Railroad Commissioners, and are not available to defendants in this proceeding.

One of the inducements which lead the legislature to grant

the right to construct these public utilities on the highways was undoubtedly the fact that it saved the utility companies the expense of condemning and paying for a right of way for their lines, and by so doing made the purchase price of electric current less to the public than it would be were the companies compelled to expend vast sums of money in acquiring a right of way for their improvements.

A careful reading of all of the statutes that touch upon this proposition shows that the subject dealt with is electric transmission lines. It goes without saying that this term "transmission lines" consists of more than poles, and the very wording of the statute above quoted shows that the legislature contemplated in the use of this term not only the poles, but the wires, guy wires, towers, cables, conduits, and other fixtures and appliances necessary for conducting electric current. As a part thereof these poles carry cross-arms, 8 feet in length, which, of course, would extend 4 feet on either side of the center of the pole which supports them. The specifications filed before the Railroad Commissioners show this manner of construction, and the same was approved by the Railroad Commissioners, and authorization for such construction was included in the franchise. The legislature empowered the Railroad Commissioners to authorize the construction of these electric transmission lines on the highway, and we can reach no other conclusion than that, when the Railroad Commissioners granted the franchise, the defendant thereby derived authority from the legislature to place all of its lines within the boundary of the highway. It would be no authority whatever for them to so construct their line that part of the same overhung the adjoining property. We think this is perfectly clear under the statute with reference to the power of the Railroad Commissioners, and they were acting wholly within their jurisdiction when they so authorized the construction of this electric transmission line on this highway. We are re-enforced in this conclusion by the exact wording of the statute, § 8309, Code 1924, which uses the words, "over or across any public highway or grounds outside of cities and towns."

Section 8310 provides for the asking of a franchise for constructing these lines "over, along, and across" any public high-

way. Section 8311 requires "a general description of the public . . . highways . . . over, across, or along which any proposed line will pass." Section 8312 provides for a notice which shall give "a general description of the lands and highways to be traversed by the proposed line or lines." Section 8313 provides for the duty of the Board and for the issuance of a franchise granting in whole or in part "upon such terms, conditions, and restrictions, and with such modifications as to location and route as may seem to it just and proper." Section 8316 prohibits this franchise from giving exclusive right to any person, etc., to conduct electrical energy, or to place electrical wires "along or over or across any public highway or public place or ground." Under § 8318, the Railroad Commissioners are required to keep a record, and, among other things, a general statement of the location, route, and termini of the transmission line or lines covered by the franchise.

It is obvious from the statutes, therefore, that the legislature has dealt with this question of electric transmission lines as an entity, treating the poles, cross-arms, wires, guy wires, etc., all as constituting the line; and, secondly, it intended, and in fact says, that the Board of Railroad Commissioners may authorize the construction of a line upon a highway, and to our minds this means but one thing, and that is the whole of the line, together with the necessary structure and attachments, is to be placed within the confines of the highway.

It is urged that a certain method of construction, which the defendant claims is impracticable, could be made by which the whole of the line would be within the confines of the highway. This question is wholly beside the issue because the Railroad Commissioners authorized the method of construction which is being carried out by the company, and we are not concerned with some possible construction other and different from that which is authorized by the Railroad Commissioners. This question might have been raised before the Railroad Commissioners, but is immaterial here.

It is insisted, however, that, because of § 4838 of the Code, the county engineer, notwithstanding the order and franchise granted by the Railroad Commission, has the power to locate

this line at such a place on the highway as he sees fit, and in the instant case he located the pole line at a point 1 foot from the boundary of the adjoining property. A corporation, like a human being, cannot be expected to obey two masters, especially where there seems to be a conflict between their rights and powers. It would appear from § 4838 that, when new lines are constructed, the county engineer has the right to locate the same on the highway. Apparently, therefore, there is a conflict between the power of the county engineer and of the Railroad Commissioners. As shown in the record, the Railroad Commissioners went no further, however, than to indicate on which side of the highway the line was to be constructed, and we believe that both sections of the statute may be given force and effect by saying that the Railroad Commissioners did locate the line on a certain side of the highway. Subject to this location, the county engineer has the right to designate where it shall be placed on that side of the highway, limited, however, to so placing the line that all of the line, including the superstructure, shall be within the boundary line of the highway. Any other construction of these two sections of the statute would put it wholly within the power of the county engineer to make nugatory the orders of the Railroad Commissioners.

Turning now to the facts in the case, the conceded facts are that if this transmission line, as located by the Railroad Commissioners, is constructed in accordance with the orders made by the county engineer, all of the electric transmission line will not be within the boundaries of the highway, but part of it will overhang the adjoining property. We think it is the right and duty of the electric company to so construct its line on the highway that its structure and superstructure shall all be within the boundary of the highway. In the instant case, the boundary of the highway is 33 feet from the center line of the pavement. Under this situation and to the end that the whole of the electric transmission line may be within the boundary of the highway, the center of the poles carrying the superstructure cannot be closer than 4 feet to the boundary line of the highway. It may be, as suggested by counsel, that these poles and lines on the highway are a nuisance and produce inconvenience to those who have

charge of the highway, but that is not a matter for our consideration because the legislature has authorized them to be there, and whatever is authorized by the legislature cannot be considered a nuisance. It may be that, in the coming demand created by traffic on our highways, the best interest of the traveling public will require that all lines and poles and other obstructions be removed from the highways, and in fact this matter is partially protected by other provisions of the statute conferring certain powers upon the Railroad Commissioners. But we have not that question before us now, and, if there be a lack of power in that respect, the legislature, under its reserve power, can take care of the matter.

The conclusion reached is that the plaintiff has the right to construct its full line, consisting of wires, cross-arms, and poles, on the highway in controversy in such a manner that the whole construction will be within the boundary lines of the highway. To this end the decree entered by the lower court should be modified to the extent that the plaintiff may make the proper application for the location of its line, and the engineer should locate such line in accordance with this opinion.

Faville, J., joins in this dissent.

Note. A similar disposition was made in the case of Iowa v. Central States Electric Co. No. 39290, — Iowa, —, 223 N. W. 247, Jan. 23, 1929.

WISCONSIN RAILROAD COMMISSION.

RE PRAIRIE FARM, RIDGELAND & DALLAS TELEPHONE COMPANY.

[U-3734.]

CLARENCE W. MAU et al.

v.

PRAIRIE FARM, RIDGELAND & DALLAS TELEPHONE COMPANY.

[U-3733.]

Rates — Telephones — Necessity for toll service.

1. An interchange of telephone business with the exchanges of other

utilities as a special service distinct from the exchange service usually covered by phone rental should be paid for by those particularly benefiting from it and in proportion to their use, which can best be measured by reasonable toll charges on such lines, p. 43.

Rates — Telephones — Desirability of toll charges.

2. Even though as a matter of law a telephone company might insist on a toll there are many cases where toll charges would not be desirable, such as where the opposition to tolls on the part of subscribers is so pronounced as to suggest a community of interest that should not be ignored, p. 43.

Discrimination — Telephones — Apportionment of tolls between exchanges.

3. It is unjust to compel the subscribers of an exchange in an inland city, required to transact considerable business in nearby market centers, to pay, through an increase of their rentals, for the maintenance of free service particularly used for the benefit of subscribers of other exchanges, p. 44.

[February 14, 1929.]

APPLICATION of a telephone company to increase rates; rates adjusted.

By the **Commission**: The Prairie Farm, Ridgeland & Dallas Telephone Company filed with the Commission on June 15, 1928 an application for authority to increase exchange rates, contending that additional income was required by the utility in order to continue satisfactory telephone service.

Clarence W. Mau, et al., filed with the Commission on June 13, 1928, a complaint against the Prairie Farm, Ridgeland & Dallas Telephone Company indicating that the utility at present provides free toll service over a considerable amount of toll line owned wholly or in part by it and requesting that the additional revenue required by the utility be provided by the establishment of equitable toll rates over these lines.

Since both of these matters relate to the rates of this company a hearing covering both cases was held at the court house in Barron on July 24, 1928. The following appearances were entered:

Charles A. Taylor, Attorney, Barron, C. W. Mau, Prairie Farm, J. A. Helland, President, Prairie Farm, Ridgeland & Dallas Telephone Company, Prairie Farm, Charles Dean, Director, Prairie Farm, Ridgeland & Dallas Telephone Company, Colfax, P. V. Nicklow, Director, Prairie Farm, Ridgeland & Dallas Telephone Company, Dallas.

A further hearing was held November 2, 1928 at Madison with the following appearances entered:

J. A. Helland, President, Prairie Farm, Ridgeland & Dallas Telephone Company, Charles Dean, Director, Colfax, Herman Boer, subscriber, Sand Creek, G. A. LaFarge, stockholder, New Auburn.

The present and proposed exchange rates of this utility are as follows:

Present Rates

Single party lines per year	$22.00 gross,	$19.00 net
Party line phones per year	17.00 gross,	14.00 net

Same rates apply to both business and residence phones.

Proposed Rates

Single party phone, per year—business	$30.00 net
Single party phone, per year—residence	22.00 net
Two party line, per year—business	25.00 net
Multi-party line, per year—business	20.00 net
All other phones, per year	17.00 net

The petition sponsored by Mr. Mau acknowledges the need for additional revenue but contends that this could more justly be obtained by establishing toll charges on the following toll lines which in the past have enjoyed free service:

Sand Creek to Colfax, Sand Creek to Bloomer, Sand Creek to New Auburn, Sand Creek to Chetek, Sand Creek to Dallas, Ridgeland to Dallas, Prairie Farm to Hillsdale.

There are two toll lines out of the Prairie Farm exchange to Wheeler and to Clear Lake on which a toll charge is now in effect. Free toll service is in effect among the three exchanges owned and operated by the utility.

A toll charge of 10 cents is in effect for all toll calls from or to the exchanges at Colfax, Bloomer, New Auburn, Chetek, Dallas, and Hillsdale that go over the utility's lines after passing thru the exchange to which connection is made. To illustrate, a call between Colfax and Sand Creek is free, but a call from Colfax thru the Sand Creek exchange and on to Ridgeland bears a toll charge. The Sand Creek exchange, therefore, obtains the benefit of free service to Chetek, New Auburn, Bloomer, and Colfax, whereas a toll rate of 10 cents is applied to the subscribers of the same utility making the same call but connected to the Ridgeland or Prairie Farm exchange. Likewise, Ridge-

land subscribers alone enjoy free service to Dallas, and Prairie Farm subscribers alone enjoy free service to Hillsdale.

As shown at the hearing, this utility has a relatively extensive mileage of clear lines, several of them metallicized, devoted solely to the interchange of long distance business with exchanges of other companies and such clear lines are producing no distinct or separate revenue other than that obtained from calls passing thru more than the connecting exchange.

[1] Generally, such interchange of business with the exchanges of other utilities is a special service distinct from the exchange service usually covered by phone rental and such special service should be paid for by those particularly benefiting from it and in proportion to their use of it. The proper payment by the users of such special service can best be measured by reasonable toll charges on such lines.

[2] To arbitrarily enforce such a policy in every instance, however, without giving proper consideration to the special circumstances involved in a particular case would be clearly unreasonable. Even though, as a matter of law, the company might insist on a toll, which is not its position in this case, the fact remains that there may be cases where toll charges would be undesirable. The opposition to toll rates on the part of Sand Creek and Ridgeland subscribers has been so very pronounced as to suggest that a community of interest prevails which should not be ignored.

Exhibit B submitted at the November hearing contains the signatures of over 190 subscribers of the Sand Creek and Ridgeland exchanges petitioning the Commission to disregard the petition of Mr. C. W. Mau, et al., to have toll rates established on the clear lines of the Prairie Farm, Ridgeland & Dallas Telephone Company. They contend that Sand Creek is an inland town, unfavorably situated, and that the imposition of toll rates would work a hardship upon the subscribers who must remain in connection with the market towns of Bloomer, New Auburn, Chetek, Dallas, and Colfax in order to derive any material benefit from connection with the Sand Creek exchange.

Exhibit A submitted at the November hearing is a petition signed by 61 subscribers of the Ridgeland exchange requesting

that free toll service be continued over the utility's clear lines and that the additional revenue required by the utility be provided by increased exchange rates.

[3] Letters from the Dovre Telephone Company of Chetek, the Bloomer Telephone Company of Bloomer, and the New Auburn Telephone Company of New Auburn indicate that these utilities are also in favor of continued free toll over the lines which they own in common with the Prairie Farm, Ridgeland & Dallas Telephone Company. The extent of the area within which widespread free toll service has been enjoyed quite apparently does not reach to the exchange of Prairie Farm. Toll rates have been in effect for some time on calls out of the Prairie Farm exchange to Wheeler, Clear Lake, Barron, and the shipping points of Boyceville, Clayton, Almena, and Poskin. Although free service still exists to Hillsdale and Ridgeland, fairness demands that this exchange must be considered separately in designing proper rates for the utility. Prairie Farm also is an inland city which is required to transact considerable business in nearby market centers. This is largely done over toll lines on which a toll rate is now in effect. The continued free toll service out of the Ridgeland and Sand Creek exchanges will not be of material value to the subscribers of the Prairie Farm exchange. It would be unjust if the subscribers at the Prairie Farm exchange should be required through an increase of their rentals to pay for the maintenance of free service so particularly used and so particularly for the benefit of the subscribers at the Sand Creek and Ridgeland exchanges.

While this application has been the cause of considerable controversy within the company the Commission has been given to understand, informally, that the present officers and directors of the telephone company as well as a large number of the subscribers, including at least a part of those who petitioned for toll rates, have agreed among themselves in favor of continued free toll service provided the Prairie Farm exchange rate, to be determined by the Commission will be so designed as to adjust the unfavorable relation which this exchange bears to the other two exchanges of the company.

Due to the fact that adequate accounting records are not avail-

able, the Commission has been unable to determine accurately the actual cost to the utility of providing this extensive free toll service.

The schedules which will be authorized in this order, however, will be designed in such a way that the rates applicable in the respective exchanges, in so far as can be determined, will each meet the costs incurred in providing the particular service.

The 1927 report of this utility shows a property and plant value of $29,727.21 on December 31 of that year. Operating expenses during that period amounted to $9,961.52 before depreciation and return. The year's revenues amounted to $12,395.29 leaving a balance of $2,433.77. Both the investment per customer and the operating expenses per customer are very low and must be recognized as conservative statements.

The schedules authorized below will provide additional revenue of approximately $2,000, bringing the total net balance for depreciation and return under the new rates up to approximately $4,400 which the Commission deems reasonable, in view of the evidently conservative statement of book value.

Without making a detailed study of the cost of the free toll service concerned in this case, which the condition of the utility's records precludes, the Commission is inclined to believe that the difference allowed between the schedule of rates for the Prairie Farm exchange and the schedules for the Ridgeland and Sand Creek exchanges provides a reasonable adjustment for the different service provided at these exchanges.

ILLINOIS COMMERCE COMMISSION.

ILLINOIS COMMERCE COMMISSION

v.

RANSOM TELEPHONE COMPANY et al.

[No. 17721.]

Rates — Telephones — Commission supervision — Free interexchange.

1. It is the policy of the Commission and the intent of the law that free service between telephone exchanges shall not be discontinued without the consent of the Commission, p. 47.

P.U.R.1929C.

Service — Telephones — Physical connection.

2. The Commission requires that telephone lines for through traffic, although used for free service, shall be maintained the same as lines used for toll service, p. 47.

Service — Discontinuance — Physical telephone connection.

3. The Commission will not order either one of two telephone companies connected by one mile of telephone line, owned by a mutual company beyond the jurisdiction of the Commission and not owned or operated by either company, to rebuild or maintain such connecting link for the purpose of continuing free service between the exchanges affected, where there are adequate toll facilities between the two exchanges over another circuit, p. 47.

Service — Mutual telephone companies — Commission jurisdiction.

4. The Commission has no power to require a mutual telephone organization to rebuild its lines or re-establish its service, p. 47.

[January 31, 1929.]

INVESTIGATION instituted by the Commission on its own motion into the discontinuance of free service between certain telephone exchanges; citation dismissed.

By the **Commission:** July 14, 1927, the Ransom Telephone Company operating an exchange at Ransom, Illinois, filed informal complaint against the Odell Telephone Company operating an exchange at Odell, said complaint being with reference to the discontinuance of a so-called free service between the two exchanges.

Subsequently an investigation was made by a member of the Commission's engineering staff and efforts were made to have the companies re-establish the free service. These efforts were without avail, and on October 11, 1927, the Commission issued an order citing both companies to appear and show cause why free telephone service between the two exchanges should not be re-established. The case came on for hearing before the Commission at its offices in Springfield, the Ransom Telephone Company being represented by Mr. D. Linten, its secretary, and the Odell Telephone Company by Mr. George DeVoigne, its president.

The record shows (1) that the Odell Telephone Company has for several years owned and maintained a circuit from Odell four miles north and three miles west, a total distance of 7

miles; (2) that the Ransom Telephone Company has for several years owned and maintained a circuit southwardly a total distance of 9 miles; (3) that the outer ends of these two circuits were connected over a distance of approximately 1 mile by a circuit installed on poles belonging to a mutual company; (4) that sometime prior to July 14, 1927, due to lack of proper maintenance this one mile of circuit became inoperative thereby interrupting the service over the entire circuit between Odell and Ransom; (5) that both companies disclaim ownership to this one mile of circuit and refuse to rebuild it; (6) that a few rural subscribers of the Odell Telephone Company desired the service restored for use in securing prices on farm commodities disposed of at an elevator located in the vicinity, but served from the exchange at Ransom; (7) that the Ransom Telephone Company, at the time of the hearing, was not desirous of re-establishing the circuit and free service between the two exchanges and wished to remove its part of the line; and, (8) that toll service between said exchange is available at a nominal rate via Pontiac and Streator or via Dwight and Streator.

[1–4] It is the policy of the Commission and the intent of the law that free service between exchanges shall not be discontinued without the Commission's consent and approval. The Commission also requires in its General Order No. 107 (P.U.R. 1923E, 43) that lines for through traffic, although used for free service shall be maintained the same as lines used for toll service. In this case both companies have maintained those sections of the circuit between Odell and Ransom to which they claim ownership and apparently the section of wire not maintained and which is the cause of free service being discontinued, is owned by neither company while the poles in said section are owned by switching subscribers of a mutual organization over whom the Commission has no jurisdiction under the law.

It appears further that in view of adequate toll facilities between the two exchanges and the fact that only a few subscribers of either company have need for this free service line, there is not sufficient justification for requiring the two respondent companies to build, at their expense, the additional line solely for the purpose of re-establishing free service. The Commis-

sion would have no power to require the Mutual Telephone organization to rebuild its lines to re-establish the service.

The Commission, therefore, finds that the citation herein should be dismissed. It is therefore *ordered* that the citation order entered herein October 11, 1927, be, and the same is, hereby dismissed.

COLORADO PUBLIC UTILITIES COMMISSION.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 765, Decision No. 2056.]

Certificates of convenience — Sale of municipal plant to private interests — Conspiracy.

1. Whether or not there has been a conspiracy on the part of a private company to force a municipality to sell its plant has no bearing upon the question of whether or not the Commission should issue a certificate to the private company to do business in that locality, p. 52.

Monopoly and competition — Rehearing — Authorization of competing plant.

2. The Commission on rehearing admitted that it had inadvertently exceeded its own powers in the granting of a previous order authorizing the construction of a new plant by a private corporation, which had acquired the distribution system of a municipal plant where the territory possibly conflicted with another municipal plant not made a party to the proceeding, p. 52.

Municipal plants — Rights of purchaser — Commission powers.

3. The mere fact that a town can construct its own plant without authority from the Commission does not mean that the vendee of its distribution system can do the same thing, p. 52.

Certificates — When required — Purchase from municipal plant.

4. Reasons why authority is needed in the case of a private corporation to do business apply with the same force in the case of a utility whose property has been purchased from a municipality as in any other case, p. 52.

Monopoly and competition — Electric system — Municipal plant.

5. One important consideration which would have to enter into the decision of whether or not the granting of authority to a private company would conflict with an existing municipal plant already operating in adjacent territory would be what the best interests of the consumers to be served by the extension are, which in turn would involve the consideration of the comparative cost of energy by both plants, p. 54.

Monopoly and competition — Municipal plants — Excessive energy.

6. Notwithstanding the primary duty of a municipality to use only its surplus energy for service outside of its corporate limits, such a plant with respect to such service has certain aspects of a public utility entitling it to invoke proper protection under the provisions of the statute with reference to interference where there appears that there is and will continue to be a separate supply of energy, p. 54.

[January 30, 1929.]

MOTION to rehear and reopen prior proceedings of the Commission on application of a company for a certificate of convenience and necessity; motion granted. Previous orders amended. Case reopened and order to show cause issued.

Appearances: Paul W. Lee, Denver, and L. E. Anderson, Brush, attorneys for applicant; G. E. Hendricks, Julesburg, attorney for the town of Julesburg.

By the **Commission**: The town of Julesburg on October 26, 1928, filed a petition asking that the order theretofore entered herein granting a certificate of public convenience and necessity to Public Service Company of Colorado be reopened and reconsidered and upon reconsideration this Commission deny to Public Service Company "a certificate of public convenience and necessity to add to its investment by the construction of power plants and station or new transmission line or lines, or to duplicate the investment of your petitioner, within said territory, to provide any other source of supply of electrical energy than from the power station of your petitioner so long as your petitioner has ample capacity therefor."

Public Service Company filed its answer consisting of some twelve pages. The matter was set for hearing and was heard in the court house in Julesburg on the 28th day of November. The parties have since filed briefs which the Commission has read and considered carefully.

For a period of some twenty years last past Julesburg has owned, operated, and maintained a municipal plant for the generation and distribution of electric energy. On June 9, 1919, it entered into a contract with the town of Sedgwick situated about fifteen miles southwest thereof in the same county, con-

taining a recital to the effect that the parties were desirous of entering into an agreement "whereby Julesburg is to furnish Sedgwick sufficient electrical current, during the life of this contract, for the use of Sedgwick for light and power purposes and for the purpose of furnishing current for light and power to consumers along the transmission line and under the Sedgwick system of distribution."

Sedgwick agreed to make exclusive use of electrical current furnished by Julesburg under the terms of this contract for lighting the streets and for power for pumping water for the Sedgwick water system. The contract was to continue for a term of ten years, expiring June 9 of this year. The town of Sedgwick built between Sedgwick and Julesburg a transmission line which it has at all times owned and operated. Julesburg built a transmission line to its town limits, at which place a substation was constructed. At this substation the electric energy has at all times been delivered to Sedgwick.

Ovid is a town intermediate to Julesburg and Sedgwick. The distribution system in Ovid was owned and operated until in the year 1926 by the Julesburg Co-Operative Grain Company, a corporation, which purchased its energy from Sedgwick. The energy distributed in Ovid has been transmitted thereto over a short transmission line running north a short distance from Ovid, connecting with the Julesburg-Sedgwick line. In 1926 the grain company sold its distribution system to Public Service Company, which procured an ordinance from the town of Ovid in the same year granting, as is stated in the title thereof:

"To the Public Service Company of Colorado, a corporation organized and existing under and by virtue of the laws of the state of Colorado, its successors and assigns, the right, privilege and authority to erect, construct, maintain, and operate a substation or substations, electric light and power plants, transmission lines, and a distribution system for the distribution and sale of electricity within the corporate limits of the town of Ovid, Sedgwick county, Colorado."

This Commission on June 24, 1927, without Julesburg being

named as or being a party to the record, made an order as follows:

"It is therefore *ordered,* that the public convenience and necessity does now, and in the future will, require the exercise by the applicant of said franchise rights by ordinance granted to it by the town of Ovid, as aforesaid, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

"It is *further ordered,* that the public convenience and necessity does now and in the future will require that the applicant be permitted to furnish electrical current for light, power, and other purposes to whomsoever may desire the same and as it may be practicable along the route of its transmission lines situate in said county; and that the applicant be granted the privilege of extending its facility or line, plant, or system, situate in said town of Ovid and said county of Sedgwick, into territory contiguous to said facility or line, plant, or system, provided any extension is made before the territory into which the extension is to be made may be lawfully served by another public utility."

On the same date the Commission made a similar order granting authority to exercise similar franchise rights which had by ordinance been granted by the town of Sedgwick, the latter having sold its distribution system and transmission line to Public Service Company.

Public Service Company has continued to the present time to take from Julesburg at its town limits all energy which the former has distributed in Sedgwick and Ovid. It appears also that Julesburg is and has for some years been supplying electricity for distribution in Big Springs, Nebraska, and that Public Service Company has bought the distribution system there and the transmission line leading to Julesburg. Public Service Company, at the hearing, expressed its intention to continue to perform the said contract between Julesburg and Sedgwick until it expires.

Shortly before the filing of the petition herein by Julesburg a transmission line leading from Ogallala, Nebraska, to Big

Springs, has been constructed. Thus a transmission line extended from Ogallala to Julesburg. Public Service Company at the date of filing of the petition was in the course of constructing a connecting line between the Julesburg-Big Springs line and the Julesburg-Sedgwick line, the connection with the former being at a point about half a mile north of Julesburg and with the latter at a point about half a mile west of Julesburg. This connecting line runs west for a mile along the Colorado and Nebraska line and south for about a mile and a quarter in Colorado. The purpose of making this connection appears to be to enable Public Service Company to procure electric energy for Ovid and Sedgwick from a generating plant situated in Ogallala, from and after the date of the expiration of the contract between Julesburg and Sedgwick and, possibly, as stated in the answer of Public Service Company, to afford the latter an additional source of energy to be drawn on in case of breakdown in the Julesburg plant or other interruption of service therefrom.

[1] The evidence shows that negotiations in the past were conducted by the Public Service Company and Julesburg for the sale of the Julesburg municipal plant to Public Service Company; that the matter was submitted at an election and the sale was rejected by the electors. Much of the evidence was devoted towards proof of an alleged conspiracy on the part of Public Service Company to force Julesburg to sell its plant. We are unable to see how a determination of this question has any bearing upon the issues now raised herein.

[2–4] If Julesburg had been made a party to the original proceeding herein it might properly be argued that in view of the fact that Julesburg had a generating plant, and of the further fact that no evidence was introduced showing that the public convenience and necessity required the construction of another plant in Ovid, the Commission would not and should not have entered an order authorizing the exercise of that part of the franchise which authorized the construction of an electric light and power plant. We are of the opinion that the Commission went too far in authorizing the exercise of all the rights and

privileges granted in that ordinance, particularly that portion which relates to the construction of a plant. We believe it is likewise true that we went too far in the order with respect to the franchise granted by the town of Sedgwick. It is true that the town of Sedgwick could, without any authority from this Commission, have constructed its own plant (People ex rel. Public Utilities Commission v. Loveland, 76 Colo. 188, P.U.R. 1925B, 512, 230 Pac. 399), but the mere fact that the town of Sedgwick could have constructed a plant without authority from this Commission does not mean that the vendee of its distribution system could do the same. The reason why a town needs no authority and a private corporation does need authority to construct a plant have been set forth in the cases decided by the supreme court of this state and need not be restated here. The reasons why the authority is needed in the case of a private corporation apply with the same force in the case of a utility whose property has been purchased from a municipality as in any other case. We are unable, therefore, to agree with the reasoning that since Sedgwick could have constructed a plant without a certificate the vendee of its distribution system may do the same. However, as the petition of the town of Julesburg was filed in this case only and not in the Sedgwick case, we will make no further order herein with reference to the exercise of the franchise rights granted by Sedgwick. It may be necessary to reopen the Sedgwick case and to modify the order therein in conformity with the views stated.

Even though the town of Julesburg had been a party to the original application herein, we are unable to see what further questions it then could properly have raised herein. We do not understand how the issues could have covered the question of Public Service Company making a new contract with the town of Julesburg by which the latter should furnish all of the electrical energy that might be distributed by the former in Sedgwick and Ovid and along the transmission line leading to said towns.

Neither do we understand how there could have been involved

in this particular application the question, (1) whether the construction of the connecting line in question is "an extension within or to territory already served by it (Public Service Company), necessary in the ordinary course of its business," and (2) whether the construction of said line is such interference "with the operation of the line, plant, or system" of Julesburg as to require an "order prohibiting such construction or extension or prescribing such terms and conditions . . . as to it (this Commission) may seem just and reasonable."

[5] Of course, the practice before this Commission is not very formal. However, on the second question, whether the construction or extension is such an interference with the operation of Julesburg's plant as to warrant the Commission in prohibiting the same or making an order prescribing terms and conditions, the evidence is insufficient to warrant a determination. It is not every interference with another utility that should be prohibited. One important consideration which would have to enter into the decision of the question would be what the best interests of the consumers to be served by the extension are. In determining this question, the Commission would have to know, among other things, the comparative cost of energy that might be brought in over the extension and that to be furnished by the Julesburg plant.

[6] We are not unmindful of the primary duty of a municipality to use the product of its plant for its own inhabitants, and that when the time comes that it has no surplus, it doubtless cannot be required to deliver energy, even though a contract for the furnishing thereof may not have expired. But in this case, it clearly appears not only that there is now, but that there will continue in the future to be, a surplus of electric energy produced by the Julesburg plant. In view, therefore, of the decision in the case of Lamar v. Wiley, 80 Colo. 18, P.U.R.1927A, 175, 248 Pac. 1009, the municipal plant in Julesburg has certain aspects of a public utility which entitles the municipality to invoke proper protection under the provision of the statute with reference to interference.

As the parties are desirous of having an early determination of the controversy, the Commission has concluded, therefore, in order to expedite the matter, instead of giving leave to Julesburg to file another complaint, to enter immediately on its own motion an order on Public Service Company to show cause. This it is doing this date.

It would seem quite desirable and reasonable that the evidence already taken in this proceeding should be made a part of the record in the new case and that there is no need of duplicating the same.

ORDER

It is therefore *ordered* that the order heretofore entered herein be, and the same is hereby, reopened.

It is *further ordered* that the order heretofore entered herein on June 24, 1927 be, and the same is hereby, altered and amended so as to read as follows:

"It is therefore *ordered* that the public convenience and necessity does now and in the future will require the exercise by the applicant of said franchise rights by ordinance granted to it by the town of Ovid except as that relates to the erection, construction, maintenance, and operation of an electric light and power plant, and this order shall be taken, deemed, and held to be a certificate of public convenience and necessity therefor.

"It is *further ordered,* that the public convenience and necessity does now and in the future will require that the applicant be permitted to distribute electric energy for light, power, and other purposes to whomsoever may desire the same and as it may be practicable in territory contiguous to its present transmission line and distribution system situated in the county of Sedgwick, state of Colorado, and this order shall be taken, deemed, and held to be a certificate of public convenience and necessity therefor."

NEBRASKA STATE RAILWAY COMMISSION.

GEORGE B. WYLIE
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

[Formal Complaint No. 589.]

Commissions — Statutes delegating power — Limitations.

1. The Commission is not deprived of jurisdiction over certain activities of utilities by a statute expressly delegating other powers to the Commission, especially where a clause provides that such act should not be construed as a limitation upon the powers of the Commission previously granted, p. 57.

Interstate commerce — Action by Congress — Jurisdiction of the Commission.

2. When Congress legislates on the matter of interstate commerce, whatever power the state previously possessed thereover is superseded, p. 57.

Interstate commerce — Jurisdiction of the Commission over railroad employees.

3. The United States Railway Labor Act governs all interstate carriers in their relations to the classes of employees covered by that act and whatever jurisdiction the State Commission may previously have had over such matters is superseded, p. 57.

Railroads — Duties of utility to employees.

4. It is the purpose of the Federal Railway Labor Act to make it the duty of both carriers and employees to settle their own relations, so far as possible, without public intervention, p. 61.

[February 1, 1929.]

COMPLAINT by Railroad Brotherhood against certain working conditions on a certain railroad; dismissed for lack of jurisdiction.

Appearances: C. A. Sorensen, for the complainant; Jesse L. Root, L. E. Caldwell, for the defendant; Hugh LaMaster, for the Commission.

By the Commission: This proceeding arises on a formal complaint filed by George B. Wylie, chairman of the Nebraska State Legislative Board of the Brotherhood of Locomotive

Firemen and Enginemen. It alleges that he is a citizen of Nebraska and that as chairman of the legislative board above mentioned, he has been authorized and directed to act for the locomotive firemen employed by defendant, who are affected by the matters complained of and that the defendant is a common carrier engaged in the transportation of passengers and property by railroad between points in Nebraska. The complaint then sets forth the following:

"That at McCook the defendant a large part of the time requires the firemen on its passenger engines to throw and handle a large number of switches in taking said passenger engines from the roundhouse to the depot, and from the depot to the roundhouse after the completion of a run, and that the same requirement is made by the defendant of the firemen at Omaha in taking passenger engines from the roundhouse to the depot and from the depot to the roundhouse after the completion of a run, and in taking switch engines from the roundhouse to the Douglas street yard and back again.

"That said requirement by the defendant of its firemen is unsafe and dangerous to the public and defendant's employees, because: 1. When the fireman is switching only one man is left on the engine who cannot watch both sides to see that everything is in the clear. 2. When the switch is on the opposite side of the engine from the engineer the fireman when on the ground throwing a switch cannot signal to the engineer. 3. Firemen are dressed for work on the engine in front of the fire door and their health is endangered when required to get off the engine in cold weather to throw switches when sweaty and unsuitably clothed for outside work."

[1–3] The complainant prays that a hearing may be held and that an order may be made commanding the defendant to cease and desist from requiring its firemen to handle and throw switches as set out in the complaint. There is also prayer for general relief.

The answer, among other matters, alleges that the Nebraska State Railway Commission has no jurisdiction under the Constitution and Laws of Nebraska, particularly under §§ 5521

and 5522, Compiled Statutes of Nebraska, 1922, and that it is also precluded from exercising jurisdiction over the subject matter by virtue of the Federal Railway Labor Act, being Chap. 8, Title 45, U. S. Code (1928 Supp. 275).

Sections 5521 and 5522, Compiled Statutes of Nebraska for 1922 read as follows:

"The State Railway Commission shall have and exercise jurisdiction over the service, facilities, and equipment of all railroads in this state and shall, upon due notice and hearing, render judgment, orders, and decrees as to the efficiency, sufficiency, and safety of the service, facilities, or equipment furnished; and if any service, facilities, or equipment is found inadequate, insufficient, or unsafe, the State Railway Commismission shall order such changes therein or additions thereto made as shall to the Commission seem necessary to render the same sufficient, efficient, and safe.

"The provisions of this act shall apply not only to those having business relations with the common carrier, but also the general public. This act shall not be construed as a limitation upon the powers of the State Railway Commission which have heretofore been granted, but as supplemental thereto. It is further provided that nothing herein contained shall be construed as giving the State Railway Commission jurisdiction or control of the relations between the railway companies and their employees and employees' orders, either contractual or otherwise."

These sections have never been before the supreme court of this state. They were considered by the Nebraska State Railway Commission in Ford v. Union Stock Yards Co. 14 Ann. Rep. Neb. S. R. C. 144, 146. The Commission said:

"The last provision of § 2 of the statute is purely negative. It is merely a limitation of the act by its own terms. It neither increases nor diminishes the power vested in the Commission by the Constitution."

Our conclusion is that the State Railway Commission was not deprived of jurisdiction by that statute.

The second ground of objection is that Congress has acted

upon this subject to the exclusion of the states. A consideration of the authorities leads to the conclusion that such objection must be sustained.

The Railway Labor Act governs all interstate carriers in their relations to the classes of employees covered by that act. The defendant company is an interstate carrier. The record affirmatively shows that a majority of the passenger trains having roundhouse service at McCook are interstate. It also shows that passenger trains operated in and out of Omaha are, in part, interstate. When Congress legislates on a matter of interstate commerce, whatever power the states previously possessed thereover is superseded.

In Simpson v. Shepard (Minnesota rate cases) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18, it is said (398–400):

"The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.' Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70. The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to provide effective regulation of that intercourse as the national interest may demand. The words 'among the several states' distinguish between the commerce which concerns more states than one, and that commerce which is confined within one state and does not affect other states. 'The genius and character of the whole government,' said Chief Justice Marshall, 'seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which

do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.' This reservation to the states manifestly is only of that authority which is consistent with, and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. (Cases cited).

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation." (Cases cited).

See also Wisconsin R. Commission v. Chicago, B. & Q. R. Co. 257 U. S. 563, 66 L. ed. 371, P.U.R.1922C, 200, 42 Sup. Ct. Rep. 232, 22 A.L.R. 1086.

[4] Under the Railway Labor Act, it is the duty of all carriers, their officers, agents and employees, to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes arising out of the application of such agreements or otherwise. It seems to be the purpose of the new act to make it the duty of both carriers and employees to settle their own relations, so far as possible, without public intervention. See American Labor Legislation Review 1926, Volume 16, Page 140. Section 152 of the act provides, in part, as follows:

"First. Duty of carriers and employees to settle disputes.—It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The term "working conditions" covers the subject matter of the present complaint. See Decisions of United States Railway Labor Board, Volume 6 (1925), Page 273.

The present act provides for the creation of several boards to settle disputes between the carriers and their employees. While the procedure is voluntary, it is the duty of both parties to invoke it. Railway Labor Act, § 152, paragraphs 2nd and 4th. If the powers of a mediation board are invoked and carried through, it results in an award which becomes the basis of a decree of the United States District Court, which, subject to appeal to the Circuit Court of appeals, is binding upon all parties. Section 159, paragraph second, provides as follows:

"An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court

shall enter judgment on the award, which judgment shall be final and conclusive on the parties."

Other paragraphs of § 159 provide for methods of impeaching the award and for appeals to the Circuit Court of Appeals. The determination of the Circuit Court of Appeals is final.

The final judgment of the District Court, or if the case be appealed, the judgment of the Circuit Court of Appeals, when certified to the District Court, may be inforced by injunction.

In Brotherhood of Railway and Steam Ship Clerks v. Texas & N. O. R. Co. 24 F. (2d) 426, it was held, on complaint of the brotherhood, that the railroad company was guilty of a contempt of an order of injunction restraining the defendant, its servants, etc., from seeking to influence the selection of representatives of the brotherhood in an arbitration of a labor dispute. The syllabus of the case is, in part, as follows:

"Railway Labor Act, § 2, Par. 3 (45 USCA § 152), providing for designation of representatives by railroads and employees for purpose of settling labor disputes without interference, influence, or coercion exercised by either party over self-organization or designation of representatives by the other, held valid."

"Railway Labor Act, § 2, par. 3 (45 USCA § 152), providing for selection of representatives by railroad and employees for purpose of settling labor disputes without interference, influence, or coercion by either party, must be liberally construed and applied, so as to give effect to paramount public convenience subserved thereby."

"Railroad, promoting organization of employees' association hostile to organized labor unions and recognizing it as representative of employees, held to have violated injunction restraining it from violating Railway Labor Act, § 2, par. 3 (45 USCA § 152), providing for selection of representatives for settlement of labor disputes without interference, influence, or coercion."

The Court also said in its opinion, at p. 431:

"Nor can there longer be any doubt that Congress had the power to, and that it must, in the interest of public peace and safety, make certain, in the first step in negotiations between the railroad employer and employee (who have long since come to be

recognized, as to this instrument of interstate commerce in their hands, not as private persons having the right to exercise 'liberty through sheer antipathy,' but as trustees of the public), that representatives of the railroad companies should not meet representatives of the employees, nominally elected by them, but in fact under the influence and control of the railroad companies. I, therefore, easily find that the legislation in question was not only within the power of Congress to enact, but that it should be liberally construed and applied, so as to give effect to the paramount public convenience subserved by it."

The same case was again before the Court and was reported in 25 F. (2d) 876, where the injunction was treated as in full force. The provisions of the statute were also sustained in Atchison, T. & S. F. R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, in 26 F. (2d) 413, and in Atchison, T. & S. F. R. Co. v. Ferry Boatmen's Union, 28 F. (2d) 26. Injunction was recognized as the proper remedy, as it is made incumbent upon the parties to use every endeavor to settle any question as to working conditions, and as it is made their duty to invoke arbitration under the provisions of the statute, and as such arbitration may result in a decree binding upon all parties, the statute must be regarded as an occupation of the field by Congress under the commerce clause of the Federal Constitution.

That the statute should be broadly interpreted as an occupation of the field is indicated by decisions of the Supreme Court of the United States. In Northern P. R. Co. v. Washington ex rel. Atkinson, 222 U. S. 370, 378, 56 L. ed. 237, 32 Sup. Ct. Rep. 160, it was held that Congress had so acted upon the subject of the hours of labor of interstate railroad employees by enacting the Hours of Service Act as to preclude a state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employees, the local regulation limiting hours of labor.

In the case just cited it was contended that as the Federal Act did not go into effect until a year after its passage, it was of no force or effect during that interim. In answer to that contention the Court said:

"But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the Court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive powers. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control,—a manifestation arising from the mere fact of the enactment of the statute."

The principle of the decision in the Washington case, *supra,* was recognized and reaffirmed in Erie R. Co. v. New York, 233 U. S. 671, 685, 58 L. ed. 1149, 34 Sup. Ct. Rep. 757.

In numerous other cases relating to safety appliance acts of Congress have been held to supersede state legislation on the same subject. Southern R. Co. v. Railroad Commission, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304; Staten Island Rapid Transit R. Co. v. Public Service Commission, 16 F. (2d) 313; Atlantic Coast Line R. Co. v. Napier, 2 F. (2d) 891; Napier v. Atlantic Coast Line R. Co. 272 U. S. 605, 71 L. ed. 236, P.U.R.1927B, 537, 47 Sup. Ct. Rep. 207.

Under the authorities above cited it must be concluded that this Commission does not have jurisdiction over the subject matter of the complaint.

P.U.R.1929C.